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New York (State) Reports. Supreme Court.

REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.

VOL. XXII.

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DURING THE YEAR 1856.

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CLASS 1. WILLIAM MITCHELL.*
" 2. JAMES J. ROOSEVELT.†
" " HENRY E. DAVIES.‡
" 3. THOMAS W. CLERKE.
" 4. JAMES R. WHITING.§
" " CHARLES A. PEABODY.¶

SECOND JUDICIAL DISTRICT

" 1. JOHN W. BROWN.†
" 2. SELAH B. STRONG.
" 3. WILLIAM ROCKWELL.**
" " LUCIEN BIRDSEY.††
" 4. JAMES EMOTT.‡

THIRD JUDICIAL DISTRICT.

" 1. MALBONE WATSON.†
" 2. WILLIAM B. WRIGHT.*
" 3. IRA HARRIS.
" 4. GEORGE GOULD.‡

FOURTH JUDICIAL DISTRICT.

" 1. CORNELIUS L. ALLEN.†
" 4. AMAZIAH B. JAMES.
" 3. ENOCH H. ROSEKRANS.‡
" 4. ALONZO C. PAIGE.‡

FIFTH JUDICIAL DISTRICT.

1. FREDERICK W. HUBBARD.*
" 2. DANIEL PRATT.
" 3. WILLIAM J. BACON.‡
" 4. WILLIAM F. ALLEN.‡

SIXTH JUDICIAL DISTRICT.

" 1. WILLIAM H. SHANKLAND.
" 2. HIRAM GRAY.
" 3. CHARLES MASON.†
" 4. RANSOM BALCOM.‡

SEVENTH JUDICIAL DISTRICT.

" 1. THOMAS A. JOHNSON.*
" 2. THERON R. STRONG.
" 3. HENRY WELLES.†
" 4. ERASMUS DARWIN SMITH.‡

EIGHTH JUDICIAL DISTRICT.

" 1. LEVI F. BOWEN.
" 2. JAMES MULLETT.
" 3. BENJAMIN F. GREENE.†
" 4. RICHARD P. MARVIN.‡

* Sitting in the Court of Appeals.
† Presiding Justice.
‡ Elected in November, 1855.
§ Resigned, November 1, 1856.
¶ Appointed by the Governor, to fill the place of JAMES R. WHITING, resigned.
** Died July 26, 1856.
†† Appointed by the Governor, to fill the place of WILLIAM ROCKWELL, deceased.

ERRATUM.

Vol. 21, page 350, lines 5 and 6 from bottom, strike out "*particular mention*" and insert "*minute-men.*"

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CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

Van Con and Adams *vs.* The National Loan Fund Life Assurance Society.

Upon the deposition of a witness, taken on commission, being offered in evidence at the trial, the defendants objected, on the ground that two cross-interrogatories, one embracing nineteen questions and the other five, were unanswered in part, but in what respect they were unanswered was not specifically stated. After the deposition had been received and read, the same objection was renewed, and exception taken. *Held*, that it would be an unjustifiable exercise of discretion to suppress the entire deposition, upon such a vague and indefinite objection; and that the refusal to do so was no ground for a new trial. Harris, J., dissented.

It is only when the officer neglects to put the interrogatories, as settled, or when the witness *refuses* to answer, that the deposition will be suppressed, on the ground of the commission having been imperfectly executed.

Where a witness has not been impeached, nor any foundation laid for his impeachment, by showing contradictory statements made by him as to a material fact, and he has not been interrogated as to what he said in a particular conversation, proof of declarations made by him on that occasion, in the absence of the party by whom he is called, cannot be received. Harris, J., dissented.

Valton *v.* National Loan Fund Life Assurance Society.

Where an individual makes a contract of life insurance, in his own name, the legal presumption is that the policy is for his benefit, and not for that of any other person.

A person has an insurable interest in his own life; and no use made by the assured, of the policy, *subsequent* to the contract of insurance, will convert it into a wager policy. If valid in its inception, he may dispose of it as he pleases. HARRIS, J., dissented.

There can be no wager policy, within the statute, unless the contract of insurance is made with a party who has no insurable interest in the life insured. The term can never apply when the policy is issued to the party whose life is insured, and when thus the contract is made directly with him. HARRIS, J., dissented.

It is only when an insurance contract falls within the category of a mere wager or bet—a simple gaming adventure—that the statute against wagers can, even by construction, apply.

It is always a question of legal construction, whether an insurance contract comes within the purview of the statute.

Where a party insures *his own life*, even if it be for the benefit of another, the latter advancing the money to pay the premium, such contract is not void for the reason that the statute against betting and gaming has been violated; *it seems*. *Per* WRIGHT, J.

Where M. V. & S. formed a partnership, the capital being furnished by M. and V.; and S. although advancing no capital, was to share equally in the profits on account of his skill in the business, but in lieu of capital, on the part of S., and as an indemnity to his copartners, an insurance was effected on his life, with the understanding that if he should die, unmarried, during the continuance of the partnership, the benefit of the policy should go to the survivors of the firm; *Held* that although M. urged the making of the contract, and aided in its successful completion, yet as the insurance was effected by S. in his own name, and not as the agent of M. and V. or for their exclusive benefit, but for the benefit, in part at least, of S., the policy was not void as being a wager policy. HARRIS, J., dissented.

THIS cause was tried before Mr. Justice WRIGHT, at the Albany circuit in November, 1852. The action was upon a policy of insurance in the sum of $10,000, effected on his own life by Conrad Schumacher, late a liquor merchant of the city of Albany. The complaint alleged the making of the contract of insurance between the deceased and the defendants, and the issuing of a policy to the assured in the month of May, 1850, to continue in force through his life or so long as he should continue to pay a premium of $68.75, in advance, on or before each successive quarter day. The complaint also alleged

that in the same month, a mutual copartnership agreement, in writing, was concluded between Schumacher and Gerhart Valton and Daniel Martin, the three composing the firm of Valton, Martin & Co. by which it was, among other things, agreed that in case of the death of Schumacher *unmarried* during the continuance of the partnership, the policy should belong to Valton and Martin, the surviving members of the firm. The plaintiffs alleged that Schumacher died unmarried during the continuance of the partnership; that the quarterly premiums upon the policy were paid by the assured, including the advance premium for the quarter current at the time of his death; that due proof of his death was furnished to the company; that all the stipulations, conditions and warranties to be complied with on the part of the assured were kept and performed; and that subsequent to the death of Schumacher, Martin assigned his interest in the policy to the plaintiff Adams.

The answer contained, 1. A qualified and informal denial by the defendants of any knowledge, information or belief that they issued the policy in question. 2. A qualified and informal denial of knowledge or information that Schumacher died at the time alleged. 3. An allegation that they issued the policy to Schumacher upon his proposal, which was the basis of the contract. 4. That the assured and his partners represented him as a merchant, a member of their firm, and a man of large means; that he was described in his policy as a merchant; that the defendants believed it; that it was all false and fraudulent, and the policy void. 5. That proof was never furnished of the age of the assured, nor of the fact, time or manner of his death. 6. That one Parke is administrator of Schumacher, owns the policy, is prosecuting another suit for the benefit of Valton and Martin, and is the real party in interest in this suit. 7. They deny any knowledge of the partnership agreement between Schumacher, Valton and Martin, and aver it to have been fraudulent. 8. They deny knowledge whether the premiums were paid, &c. and aver, on information, that the policy was obtained with the fraudulent intent to secrete or otherwise dispose of the assured, and claim the amount of the

insurance. 9. They deny knowledge of the assignment by Martin, of his interest to the plaintiff, Adams.

On the trial it appeared on the part of the plaintiffs that Valton, Martin & Co. were liquor merchants, and opened their store in Albany, in April, 1850. They were partners, and were publicly known as such from the commencement, though written articles were not executed until about the 30th of May. On the 20th of May, Schumacher applied to the defendants' agent at Albany, for an insurance upon his life. A policy was issued by the defendants on the certificate of their agent and medical examiner, and the application and accompanying papers; and the defendants ante-dated the policy as of the 15th of May. The assured was in good health, unmarried, thirty-three years of age, a native of Germany, and for over six years a resident of the United States. He was skilled in his calling before he came to this country, and this was one of the inducements to the partnership between him and Martin and Valton. It was proved that he was drowned in the Hudson river opposite the city of New York, on the 4th of September, 1850. On the 7th of September, the body was found and buried by the coroner of Jersey City, and subsequently recognized on disinterment, not only by its general appearance, but by the wearing apparrel, which was clearly identified, as well by the friends of the deceased, as by the tradesmen from whom portions of it had been purchased. The requisite proofs were furnished to the defendants, and no objection was taken to their sufficiency.

On the part of the defendants, evidence was introduced tending to show that though the policy was issued to Shumacher, and on his application, his partner, Martin, aided him in procuring it: that Martin paid the premiums; that he represented Schumacher to be his partner, and a moneyed man; that Schumacher, among other things, did business about the establishment which would have been appropriate to a porter's employment; that his dress and deportment were those of a man of limited means; that the surviving members of the firm terminated their partnership connection in the course of the following year; that Oltman, who was with Schumacher when he was drowned, was

an employee of the firm of Valton, Martin & Co., and removed some six months afterwards to one of the western states; and that it was unusual for the bodies of persons drowned in the Hudson to be washed ashore, as in this instance, within three days after death. Upon several of these questions the evidence was conflicting. It was proved that the money advanced by Martin to the defendants by way of premium, was received by him for that purpose from Schumacher, the assured.

The testimony being closed, the judge charged the jury that it was essential to the maintenance of the action that they should be satisfied from the evidence that Schumacher was in fact dead. If he was, that the action was sustained, *unless* there had been a false warranty, or *unless* the policy was obtained from the defendants by fraud, or with the fraudulent intent, on the part of Valton and Martin, or one of them, to which the insured was cognizant, of thereafter secreting or disposing of Schumacher, and making claim to the insurance under their articles of copartnership, and that such fraudulent intent had been consummated; that if the insured untruly represented that he was a partner in the firm of Valton, Martin & Co., or that he was the *moneyed man* of the firm, and that either or both such representations were material to the risk, the policy was avoided and there could be no recovery: but if such representations were true, or, if not true *were not material* to the risk, the action, *prima facie*, was sustained.

The judge further charged the jury, that one branch of the defense was that the policy had been obtained fraudulently; that Valton and Martin, in conjunction with Schumacher, had fraudulently conspired to obtain from the defendants the policy with the fraudulent intent of secreting or disposing of Schumacher and making claim to the insurance, and that Schumacher had been secreted or disposed of with such fraudulent intent; that, to sustain this defense, evidence had been given of the representations of Martin in the presence of Schumacher, prior to the issuing of the policy, and the character, condition and conduct of Martin, Valton & Schumacher; that the question of fraud was exclusively a question for the jury; if the evidence

satisfied them that the policy was obtained by fraudulent representations, or was the result of a fraudulent intent on the part of Martin, Valton & Schumacher or either of them, which had been carried out either by the secreting or disposing of Schumacher, then the defense would be established. But if the facts and circumstances given in evidence were not of sufficient strength to satisfy them that fraud had been committed, this branch of the defense failed.

The defendants' counsel requested the judge to charge, that if the jury should find that Martin and Valton, or either of them, procured or paid for the policy, for their own benefit, though with the assent of Schumacher, it was void as being a wager policy. The judge refused so to charge, and the defendants' counsel excepted. The defendants subsequently moved, upon a case, at special term, for a new trial. The motion was denied, and from that decision the defendants appealed to the general term. The court were unanimous in overruling most of the objections on which the appellants relied. The opinions delivered are confined to the questions on which there was any difference of opinion between the members of the court.

H. Nicoll, for the appellants. I. The complaint should have been dismissed at the trial on the ground that the policy of insurance was in effect, so far as the assignees were concerned, a *wager policy*, and void by statute. (1.) Contracts of insurance are contracts of indemnity, and can only be enforced in favor of the parties claiming an interest in them, when such parties have sustained a loss, and then only to the extent of such loss. This principle is applicable to insurances upon *life* as well as to marine and fire risks. (*McLaren* v. *Hartford Fire Ins. Co.*, 1 *Selden*, 151. *Goodsall* v. *Baldero*, 9 *East*, 72. *Lucena* v. *Crawford*, 5 *Bos. & Pull.* 300. *Ex parte Andrews*, 1 *Madd.* 573. *Halford* v. *Kymer*, 10 *Barn. & Cress.* 724. *Devaux* v. *Steele*, 6 *Bing. N. C.* 358. *Stockdale* v. *Dunlop*, 6 *Mees. & Welsby*, 224. *Park on Ins. ch.* 22, *p.* 419.) (2.) All contracts whereby a gain on the one side and a loss on the other are made dependent upon an uncertain event, are *wagers*, and

void by statute. Such policies of insurance only as are made for indemnity or security are excepted. Policies of insurance when not so made are wagers, and void. (2 *R. S.* 4*th ed.* 72, §§ 9, 10. *Amory* v. *Gilman*, 2 *Mass. Rep.* 1. *Buchanan* v. *Ocean Ins. Co.*, 6 *Cowen*, 318. 2 *Bl. Com.* 459, *N. Y. ed.* 1852.) (3.) By the assignment of a policy of insurance, the assured, parting with his interest in the same, ceases to be the party for whose security or indemnity the policy is held. The contract of insurance by such assignment becomes in effect a contract between the insurer and the assignee, who, by force of the transfer, is the party insured. It follows, therefore, that unless the assignee has taken and holds the policy for his indemnity or security, it is a wager within the statute, and void. (*See cases cited to first subdivision ut supra.*) (4.) The plaintiffs claim that the policy in question was absolutely assigned to Martin and Valton, provided the assured should die during the continuance of the partnership, unmarried. It is neither averred, proved or pretended, that said assignment was made in any sense for the security or indemnity of Martin and Valton. As between them and the insurer, the contract became by the assignment a plain wager by which the latter made a bet of $10,000 with the former that the assured would not die during the continuance of the partnership, unmarried. (5.) The terms "indemnity and security," when applied to policies on lives, may be extended to those numerous cases where insurances have been effected for the benefit of persons having by nature claims for support and maintenance upon the assured, and who, it may be presumed, would sustain a pecuniary loss by his death. No such state of facts is claimed to exist on the part of Martin and Valton under the policy in question. They had no interest in the life of the assured. It was solely *by his death* that they were to be benefited. (*Lord* v. *Dall*, 12 *Mass. R.* 116.) (6.) If the plaintiffs had claimed that the policy in question had been assigned for the indemnity or security of Martin and Valton, it should have been averred and proved how and to what extent they had been damnified or become liable by the death of the assured. Nothing of the kind was done. (*Robbins* v. *N. Y.*

Ins. Co., 1 *Hall*, 325. *Romeyn on Life Ins.* 20. 2 *Burrow*, 1167, 1182, 1183. 2 *Phil. on Ins.* §§ 304, 5.)

II. The complaint should have been dismissed at the trial, on the ground that the articles of copartnership between Schumacher, Martin & Valton, did not amount to an assignment of the policy. (1.) The undertaking of Schumacher was simply a personal covenant, which gave the holders no lien on the fund. There was no such appropriation as would authorize the defendants to pay the amount of the policy to the plaintiffs. (*Rogers* v. *Hosack*, 18 *Wend.* 319. *Hoyt* v. *Story*, 3 *Barb. S. C. R.* 262.) (2.) The said agreement between Schumacher and Martin and Valton was a *wager*, dependent upon the unknown or contingent event, that Schumacher should die unmarried during the continuance of the partnership. Schumacher virtually wagered the policy of insurance on such contingency. (*Patterson* v. *Powell*, 9 *Bing.* 320. *Cowp.* 583. *Phil. on Ins.* § 79.)

III. The jury, upon the evidence, would have been justified in finding that Martin & Valton, or one of them, procured or paid for the policy of insurance for their own benefit. The refusal of the learned judge who tried the cause to charge the jury that if they should find such to be the fact, the policy was void as being a wager policy, was erroneous, for the reasons already given. (*Wainwright* v. *Bland*, 1 *Mood. & Rob.* 481. *S. C.* 1 *Mees. & Wels.* 32.)

IV. The plaintiffs have neither averred, nor shown upon what consideration the assured, Schumacher, made the agreement with Martin & Valton, that they should have the benefit of the policy of insurance in case he died unmarried during the continuance of the partnership. The evidence in the case would have sustained the jury's finding that such agreement formed no part of the consideration of the partnership, and that it was without any consideration whatever. The learned judge erred in refusing to charge the jury as requested, that if they believed such to be fact, the said agreement was void, and conveyed no title in the policy to Martin & Valton; that the same was evidence of fraud, as showing no occasion or reason for an insurance on Schumacher's life, and that the jury might take the

latter circumstance into consideration in looking at and weighing the evidence in case of alleged death, and requiring more scrutiny in considering the same.

V. The deposition of Charles Frederick Oltman, a witness on behalf of the plaintiffs, was not admissible, and should not have been received in evidence, by reason of the omission and neglect of the witness to answer fully and fairly the *first* and *ninth* cross-interrogatories propounded to him on behalf of the defendants; and the objections to the deposition, on that account, were properly taken at the trial. (*Kimball* v. *Davis*, 19 *Wend.* 437. *Brown* v. *Kimball*, 25 *id.* 259. *Smith* v. *Griffith*, 3 *Hill*, 333.)

As to the first cross-interrogatory: By this interrogatory Oltman was required, among other things, to state whether he pursued one or more occupations before he left, and to describe each particularly; and, also, the places where, and the persons with whom he pursued such occupations. The witness, in answer to this interrogatory, stated that he was a clerk in a court of justice before he left Germany; that he followed the mixing of liquors in Ovelegonne and in Bremen; that he did not recollect the names of the persons that he mixed liquors for, and that he did it when traveling. The witness has wholly failed to give the title of the court of justice in which he was a clerk; or the place where it was held; or the names of the persons with whom he followed said occupation. Considering the position of this witness with reference to the plaintiffs' case, the inquiry by the defendants into his previous history, was plainly material. The witness, by his mode of answering the cross-interrogatory has evaded the inquiry, and rendered it practically fruitless. *As to the ninth cross-interrogatory:* By this interrogatory the witness was required to state the business in which *after* May, 1850, Martin and Valton were engaged —of whom they bought—and to whom they sold, and the names of both, and what they bought and sold. The only answer given by the witness to this interrogatory was that he knew nothing of the business of the said firm till after the forepart of July, 1850. The interrogatory was not limited to any period of time

after May, 1850, but required an answer from the witness of all his knowledge on the subject inquired about, down to the time of taking the deposition. Having been in the employment of Martin & Valton for seven or eight months after the forepart of July, 1850, during all which time they were engaged in business, he could and should have answered the interrogatory fully, or alleged his want of all knowledge on the subject; which he has not done. The whole case plainly shows that these inquiries were plainly material.

VI. The statement in the policy of insurance, that the assured Schumacher was a *merchant*, being a warranty that he was so at the time of signing the proposals for insurance, *was a condition precedent*, to be established by the plaintiffs, by *competent proof*, in order to show a right to a recovery upon the policy. (*Craig* v. *U. S. Ins. Co.*, 1 *Peters' C. C. R.* 410. 2 *Phillips on Insurance*, 752, 753, 2*d ed.* *Huckman* v. *Fernie*, 3 *Mees. & Wels.* 505. *Wall* v. *East River Ins. Co.*, 3 *Seld.* 370.)

VII. The plaintiffs, upon the trial, gave no evidence whatever showing or tending to show that Schumacher was a merchant at the time of signing the proposals for insurance, while the proof produced on both sides fully sustains the presumption that such was not the fact. The verdict of the jury was therefore in this respect without evidence to sustain it, but directly against the evidence in the case.

VIII. A motion for a new trial upon a case is an application addressed to the discretion of the court, and will always be granted when the verdict is clearly against the weight of evidence, except in penal actions, or in those sounding in vindictive damages. (*Mumford* v. *Smith*, 1 *Caines' R.* 520. *Astor* v. *Union Ins. Co.*, 7 *Cowen*, 202. *Fowler* v. *Ætna Ins. Co.*, 7 *Wend.* 274. *Abbott* v. *Sebor*, 3 *John. Cas.* 39.)

IX. The evidence given upon the trial fully established, and without contradiction, that at the time of effecting the insurance, representations were made on behalf of Schumacher, that he was a partner with Martin, and the moneyed man of the concern.

X. The testimony of Lacy and Staats conclusively establishes

that such representations were material to the risk, that they were made to remove impressions unfavorable to taking so large a risk upon the life of Schumacher, and that if they had not been made, the policy of insurance would not have been granted. Such representations, therefore, if false, rendered the policy void. (*Sibbald* v. *Hill*, 2 *Dow. Parl. Cas.* 263. 2 *Duer on Ins.* 680. 1 *Phillips on Ins.* (*last edition,*) §§ 541, 542, *and cases cited. Wainwright* v. *Bland, ut supra.*)

XI. The jury, by their verdict in favor of the plaintiffs, must have found either that said representations were not made, or if made were not material, or that the same were not untruly made. Their finding in every respect, other than the last, would have been against the evidence.

XII. If the jury found that the representations in question were not untruly made, it is submitted that their verdict is, in this respect, clearly against the weight of evidence.

(1.) As to the representation of partnership: The articles of copartnership conclusively establish that the partnership was not to commence until the 1st of June, and said articles were in fact not executed until the 30th of May; the insurance was effected, and the representation made on the 21st of May. If there had been a previous partnership, which will not be pretended by the plaintiffs, it lay with them after showing the formation of the partnership on the 30th of May, to prove such previous partnership, which they did not attempt to do. If it be contended that the partnership referred to in the representation was the one afterwards formed, it is submitted that this representation, when taken in connection with the statement that Schumacher was a moneyed man, was false, and made with the design of inducing the belief that Schumacher had contributed to the capital of the firm, when in truth the object of effecting the insurance was to enable him to assign the policy to his intended partners; the disclosure of this intention would have prevented the insurer's taking the risk, as the parties well knew. The *suppressio veri* in this case is therefore in fact a *suggestio falsi.* (2.) As to the representation that Schumacher was the moneyed man of the concern: Taken in connection with

the representation of partnership, the parties must have intended to be understood as asserting that Schumacher was the partner who had brought the money into the concern. This was palpably a falsehood; the articles of copartnership show that he contributed nothing to the firm. If the representation be held to have been simply that Schumacher was a moneyed man, then it is submitted that the evidence clearly shows that such representation was false. (1.) Nothing was shown as to Schumacher's previous history: he had been in this country for ten years, and Martin had known him for fourteen years. (2.) The services performed by Schumacher in the store—his appearance, as spoken of by Martin, in his interview with Dr. Staats—the restrictions put upon him in the articles of copartnership—the coming from Albany to New York, and remaining there without baggage for more than ten days, and getting money to pay for his board in advance, from Valton, whom he styled his boss, when taken in connection with the entire and significant omission of the plaintiffs to explain any one of these circumstances, justify the conclusion that Schumacher was not a moneyed man, within the meaning of the representation.

XIII. The peculiar circumstances of the case; its novelty; the extraordinary articles of copartnership, giving Valton and Martin an interest not in the life, but in the death of their copartner; the many elements of suspicion against the good faith of the transaction; the sudden and singular death of Schumacher as alleged; the disappearance of Martin, who was the prime mover in the whole matter; the vague and evasive deposition of Oltman, the chief witness; the examining of said witness under a commission, and thus depriving the defendants of having him examined orally before the jury; the sudden appearance of the parties in Albany, where they were all strangers; the want of all attempt to give any explanation as to their previous history; and the utter failure to show that any of them were ever possessed of any means; require that the verdict of the jury should not be sustained unless the preponderance of the evidence is clearly in favor of the plaintiffs, and which it is submitted is not the fact.

John K. Porter, for respondents. I. The verdict of the jury was fully sustained by the evidence. (1.) The fact of Schumacher's death was established beyond all controversy. It was proved by the evidence of Oltman, who was with him at the time he was drowned. The body was subsequently recovered, and recognized even after disinterment. The pantaloons were identified by the party from whom they were purchased, and the neck handkerchief by the production and correspondence of the two halves, one of which was worn by young Valton, and the other by Schumacher on the day of his death. The evidence of a local usage, among those drowned in the Hudson, to remain submerged for five days without drifting or bleaching, is overcome by clear and controlling proof. The coroners examined on the part of the plaintiffs, speak from facts within their knowledge, at war with the defendants' theory. It is shown also that at the time Schumacher was drowned, a south east wind was prevailing, the tendency of which would be to drift the body towards the Jersey shore. (2.) The pretense that the premiums were not paid by Schumacher is affirmatively disproved. The policy acknowledges the payment by him of the original premium; and the receipt for the August premium, as well as the letter from Schumacher enclosing it, shows that it was paid from his funds, though transmitted by the hand of Martin. (3.) The claim that the assured was not a *merchant*, is negatived by all the evidence. He is proved to have been a liquor merchant; to have become skilled in that calling, even in Germany, and to have pursued it as his vocation down to his death. (4.) The pretense of fraudulent *oral* representations to Lacy, the defendants agent, is equally unfounded. Schumacher personally made no oral representations; there is no proof that he heard the jesting conversation between Lacy and Martin as to his means; and there is no reason to suppose that if he had heard it he would have gathered its tenor, with his imperfect knowledge of our language. Lacy admits upon his cross-examination that he made no inquiry as to the means of the assured, and the question was immaterial to the risk. His alleged suspicion that Schumacher was a porter instead of a partner was at

war with his own acts, as well as the evidence. It was for the jury to scrutinize the testimony of the agent, to reconcile his conduct with his supposed suspicions, and determine in view of the whole evidence how much reliance could be placed on the accuracy of his recollection. (5.) The theory of the defendants, that Schumacher conspired with his partners to get his life insured by false pretenses, and be murdered for their benefit, is not so probable that a jury should be condemned for questioning it. Nor is it extremely probable that the first man they happened to employ in their business was ready to volunteer as his murderer; and that the time and place selected for the crime should be on a summer afternoon, in the Hudson river, in full view of two cities, and of the vessels afloat and at anchor on every side; trusting to chance for the recovery of the body, and to the murderer for the evidence of death. Nor would a jury deserve much censure who should hesitate to believe, without evidence, that Schumacher conspired with Valton and Martin to get his life insured by false pretenses, with a view of being *kidnapped and secreted* for four years, and then reappearing to share the proceeds of fraud and perjury with them and his own porter. And even if this could be believed, it would be somewhat remarkable that on the 7th of September, the body of *another man* should rise at Jersey City, in the very apparel which he wore four days before, at the Shakespeare Hotel, and with form and features so similar, as to be recognized as those of Schumacher, after being deposited for twelve days in the grave.

II. The questions of fact were submitted under a charge to which no exceptions were taken, and on these questions the verdict is conclusive. (1 *Sandf.* 260, 262. 7 *Barb.* 271, 275. 2 *Wend.* 352, 356.)

III. There was no error in the decisions of the court as to the admission and exclusion of evidence. (1.) The objection to the introduction of the deposition of Oltman was properly overruled. It was not *specific.* It did not point out any portion of the first and ninth interrogatories which the witness had failed to answer. It was unfounded *in fact.* Embarrassing as it was to answer

some *twenty questions* embraced in the first interrogatory, the witness did so fully and fairly The *ninth* interrogatory erroneously assumed that the witness was with Martin & Co. from the 30th of May; and he states in his answer why he is unable to give the information desired. Besides, it is only when the commissioner neglects to *propound* the interrogatories, or when the witness *refuses* to answer, that the deposition may be suppressed. (2.) The court properly excluded the evidence of Oltman's declarations. Neither of the *plaintiffs* were present when they were made. They were not offered to *contradict* the witness on any point as to which he had been interrogated. The court were not even informed what the proposed declarations were, but were left to spell out some ground on which the offer might be relevant, or the evidence competent. This was no part of the judge's duty (24 *Wend.* 381, 384.)

IV. The court properly declined to hold, or to instruct the jury to find, that the policy in question was a wager policy. (1.) Policies of insurance are not within the statutory prohibition of wagers; and even if they would be otherwise, they would clearly be within the exception. (1 *R. S.* 3*d ed.* 839, § 10.) (2.) But the defendants' contract of insurance was with *Schumacher*, and not with the assignees. Their interest was derived from the assured through a subsequent agreement. The fact that he was the contracting party is not only established by the proof, but admitted by the pleadings. (3.) Schumacher had an insurable interest in his own life; and the policy having been valid in its inception, between him and the defendants, no subsequent assignment of it by him could transmute it into a wager policy. (12 *Mass. Rep.* 115. 3 *Sim.* 149.) (4.) Even if the contract had been made with the assignees, instead of Schumacher, it would not have been a wager policy, for they, as his partners, had a pecuniary interest in his life. (*Peake's N. P. Cas.* 151. 9 *East*, 72. 12 *Mass. Rep.* 115.) (5.) If on any conceivable ground this could have been deemed a wager policy, the defendants cannot avail themselves of it, for the proposition was so framed as to conceal the ground instead of disclosing it; nor, if the proposition had been more specific, could they have

obviated the equally fatal objection that no such defense was interposed by the pleadings.

V. Nor is it sufficient, on a motion for a new trial founded upon a case, to show error on the part of the court, either in the admission or exclusion of evidence, or in giving or withholding instructions. The appellants must go farther, and satisfy the court that the error not only *might* have produced injustice, but *has* produced it in the particular case; that the verdict upon the whole case was contrary to law or evidence, and was produced by the errors complained of; and that the parties complaining fully and fairly presented the specific point on which they relied, so that the court at *nisi prius* decided, and intended to decide, the very question raised before the appellate tribunal. (10 *Barb.* 453. 4 *id.* 324. 3 *id.* 548. 12 *Wend.* 41. 1 *Comstock*, 92, 4.)

Wright, J. I endeavored to bring to the trial of this cause the utmost care. The actors were all foreigners, Germans on the one side and Englishmen on the other, and for any thing that appeared by the evidence, of equal respectability and entitled to an equal measure of consideration at the hands of the courts. Through the probably careless discharge of duty by their agent, and his eagerness to obtain risks, the defendants were involved in a litigation for a large sum. The principal defense set up in the pleadings was, that the policy was obtained by fraud. The complaint averred the issuing of the policy, the payment of the premium, and the death of Schumacher, upon whose life the insurance was effected, none of which averments were denied by the answer. The answer alleged as new matter, that upon the application to insure, Schumacher was represented as a merchant, a partner with Valton and Martin in business, and a man of large means, which representations were untrue and avoided the policy; and that the policy was obtained by fraud, and with the fraudulent intent of Martin and Valton, with or without the concurrence of Schumacher, of soon thereafter secreting or otherwise disposing of Schumacher, and making claim under their pretended articles of partnership, on the

defendants for the amount of the insurance, and that Valton and Martin, or one of them, had secreted or otherwise disposed of Schumacher with such fraudulent intent. It was not pretended in the pleadings that Martin or Valton, or either of them, procured or paid for the policy for their own benefit, and that it was thereby void as being a wager policy. No such issue was presented or hinted at: nor when the case was submitted was there really any competent or sufficient evidence to go to the jury on the question of a fraudulent evasion of the statute against wagers.

It is admitted that upon the issues made by the pleadings, and indeed on the whole case, the questions of fact were properly submitted to the jury; and they have found against the defendants. I anxiously desired on the trial that right only should prevail, and I am still desirous if any error in law has been committed by me, to the prejudice or injury of the defendants, that a new trial should be awarded. But I frankly confess that I am not willing or desirous, more in this instance than any other, that the parties should be allowed to present the case to another jury, for the reason only, that mystery, as my brother Harris expresses it, "still seems to envelop some of its principal features," or that a shadowy, undefined suspicion of wrong still attaches to it.

It is the opinion of one of the members of the court, that no error was committed in the admission or rejection of evidence, or in the charge or refusal to charge as requested. Another has come to the conclusion that the deposition of Oltman should have been suppressed; that the defendants should have been permitted to prove his declarations made to their agent, as to the circumstances attending the death of Schumacher; and that it was erroneous, under the evidence in the case, to refuse to charge, that if the jury found that Martin or Valton, or either of them, procured or paid for the policy, for their own benefit, though with the assent of Schumacher, it was void, as being a wager policy. The first two objections were but feebly urged on the trial, and the last was not thought of, as being in the case, until after the jury had been charged. Indeed, had the

first been allowed, pretty much all of the defendants' theory of a fraudulent conspiracy to secrete Schumacher and claim the insurance money, would have vanished, for it was upon Oltman's "marvellously strange" narrative of the death of Schumacher, that the theory was principally based. Under the pleadings, it was not necessary that the plaintiffs should have introduced the deposition of Oltman, for it was only important to prove the death, and that was averred in the complaint, as well as the time at which it occurred, and not so denied in the answer as to put in issue either the fact or the date. These being material allegations, were, for the purposes of the action, to be taken as true. (*Code*, § 168.) The plaintiffs might have rested their case, on showing the assignment from Martin to the plaintiff Adams, and proving the fact that the required notice had been given to the defendants of the death of Schumacher. But they chose to proceed as though by the pleadings they were put upon proof of all the material allegations in their complaint, and as the case was novel in some of its aspects, and the sum involved large, I was not disposed to interfere. With the view of substantial justice between the parties a most liberal construction was given to the answer of the defendants. Had the plaintiffs stopped after proving the facts put in issue by the pleadings, leaving to the defendants to establish affirmatively the frauds set up in their answer, there would have been little "mystery surrounding the case," and nothing "peculiar in the character and circumstances of the principal witness." The defendants would scarcely have made an approach towards establishing the fraud charged in their answer. As it was, not a single fact was affirmatively shown by the defendants, bearing on the issue of a conspiracy between Valton, Martin & Schumacher, to defraud the insurance company by obtaining the policy, and either secreting, kidnapping or murdering Schumacher, that two of the conspirators might claim the moneys secured to be paid by the policy. They relied not on facts proved by themselves, but upon the improbability and inconsistency of the statements of the plaintiff's witnesses to prove Schumacher's death. Fraud was to be inferred, not from facts and circumstances proved legiti-

mately and directly tending to the conclusion, but because the defendants had succeeded in throwing some mystery about the case, and stoutly declared that the principal witness of the plaintiffs to prove Schumacher's death was not to be credited. Oltman's deposition, with the testimony of their agent, was all the defendants had on which to go to the jury upon the questions of fraud or false representations. The objection, therefore, to the deposition was feebly put forth, but as the plaintiffs chose to offer it, and insist upon its reception, we are now to say whether there was error in refusing to suppress it.

The case states that upon the deposition of Oltman taken on commission, being offered in evidence, the defendants objected, on the ground that two cross-interrogatories, the first and the ninth, were unanswered in part: and after the deposition had been received and read the same objection was renewed, and exception taken. If this meant any thing definite, it was that the court was asked to suppress the entire deposition on the ground of a partial failure to answer what the defendants' counsel termed two cross-interrogatories. That which is called the first cross-interrogatory embraced nineteen questions; the ninth, five questions. Which of these numerous questions Oltman had failed to answer was not pointed out: but the court was left to ascertain from an examination of the interrogatories, and indeed the entire deposition, whether the witness had failed to tell the whole truth. In what respect the interrogatories were unanswered was not specifically stated. Under these circumstances, and with such an indefinite objection, I should have deemed it an unjustifiable exercise of discretion to have suppressed the deposition. Suppose Oltman had been upon the stand as a witness, and nineteen distinct inquiries had been put to him at one time, and he had attempted to answer all of them: but the defendants' counsel supposing he had failed in part, moved to strike out the whole of his testimony, without stating wherein he had failed; would any judge, under such circumstances, have stricken it out? I think not. And if not in such case, clearly it could not be justified when the parties join in a commission to examine a witness, and the defendants lie by until the trial, and

then surprise their adversary and the court with a vague objection. But I think that it is only when the officer neglects to put the interrogatories settled, or when the witness *refuses* to answer, that the commission is deemed to have been imperfectly executed; and the deposition for that reason suppressed. This is as far as any case has gone, in the courts of our state. Can it be when a party unites all sorts of questions in an interrogatory, when there is no neglect of the officer to put them to the witness, and the witness does not refuse to answer, but gives what he and the officer deem a proper and sufficient answer, that the court is called upon, on the trial, to determine as to the pertinency of a part, or the whole, of the interrogatory, and the willful attempt of the witness to evade a full answer, and as these questions shall be found, to receive or suppress the entire deposition? Let this rule be established, and I venture to affirm that four-fifths of the commissions issued to examine witnesses will be found to be imperfectly executed, and consequently to be suppressed. But if it be conceded that evading an answer to a pertinent inquiry is sufficient ground to suppress a deposition, and that the refusal to suppress it upon a general objection like this, is available to the defendants, was the objection well taken in this case? It is to be observed that all the plaintiffs proposed to prove by Oltman was the death of Schumacher, and the circumstances attending it. This was the single point to which he was interrogated; and this was a work of supererogation, for as has been remarked, the fact was not put in issue. There were seven direct interrogatories, and four of them related to the witness' age and occupation, and his previous acquaintance with the parties to the action, and with Schumacher. But this was enough to start the defendants' counsel on a rambling excursion in search of something on which to build a defense. It is said that the plaintiffs chose to examine the witness on commission, instead of having him in court; and this is put forth as a reason for regarding many of the cross-interrogatories as pertinent. But is this really a fair argument? The witness remained in the employ of Valton & Martin for six months after Schumacher's death, and then left the state.

The plaintiffs could not coerce his personal attendance in court, and to obtain his testimony were driven to a commission. The agent of the defendants knew of Oltman being in Albany in September and October, 1850, and was informed that he was with Schumacher when he was drowned. He accompanied the agent to the office of an attorney, and they examined him critically respecting the circumstances of Schumacher's death. The agent caused him to be arrested on a charge of conspiracy to defraud the defendants, which charge was dismissed, and he remained in the state for months afterwards. Possessed of all the information derived from an examination of Oltman, the defendants, after this suit was commenced, in April, 1852, joined in a commission to examine him on interrogatories in the state of Indiana. Though the plaintiffs had interrogated him to but a single point, there were sixteen cross-interrogatories proposed, embracing in them nearly two hundred questions, half of which had no relation to Schumacher, or his death, or the circumstances under which he was drowned. Seven of the interrogatories, embracing fifty questions, related to the witness himself, distinct from any connection with or knowledge of Schumacher, the precise place of his birth, who were his parents, the name of his father and his occupation, where he lived, when the witness came to this country, by what route he came, what his occupation was before he left, with whom he lived, the places where he lived, and the persons with whom he pursued his several occupations, who came with him to this country, what had been his occupation each month since his arrival, who he had worked for particularly, the compensation that he had received, and generally every act of his life since his arrival in the United States. Two of the interrogatories related solely to Martin and Valton, embracing thirty-four questions respecting the pedigree of each, their business, how old the witness supposed they were, whether they were ever married, or had any children, and how many. There was but one interrogatory as to the circumstances of Schumacher's death, and that embraced fifty-three distinct questions. We are told now, that in the first interrogatory, among other things, he was required to state whether he

pursued one or more occupations before he left Germany, and to describe each particularly, and also the places where, and the persons with whom, he pursued such occupations; and that by his answer he designedly evaded the inquiries. But conceding that these precise inquiries were material and pertinent, was there any design apparent to evade answering? He was asked what his occupation was before he left Germany, and whether he pursued one or more occupations; and with whom, and where he lived, before he left. To these inquiries he answered that his occupation was that of clerk in a court of justice; that he lived with his mother, (having previously said that his father had been dead about ten years,) naming the town, county and dukedom; that he followed sometimes the mixing of liquors in Ovelegonne and in Bremen, but did not recollect the names of the persons that he mixed liquors for; that he mixed liquors when *traveling*, that is, when away from his place of residence. This was substantially answering the inquiries, and in a way that a person would ordinarily answer them. It is now said that he wholly failed to give the *title* of the court of justice of which he was clerk, or the place where it was held, or the names of the judges, or the persons under whom he acted as clerk. But did the interrogatory as to what *occupation* he had pursued suggest to the witness that he was to answer as to these things? Besides, the frame of the interrogatories was calculated to lead the witness precisely to the answers given. The first question was as to his occupation. This he answered by stating that it was that of clerk in a court. The next inquiry was whether he pursued one or more occupations; and this was followed by an inquiry, not as to what occupations he had pursued, but with whom and where he lived before he left; and he was then asked to describe with whom and where he lived; and getting back to the question of occupation, the places where, and with whom he pursued such occupations. I confess I can perceive no design to evade answering: but if the defendants have failed to get a full description of the court in which the witness acted as clerk, it was not because the witness strove to conceal the information, but because the interrogatory failed to convey to him the idea

that it was wanted for any purpose. Again; had he evaded answering fully as to the persons with whom he had pursued any particular occupation in Germany, it would have been no ground for suppressing the deposition; nor, had he been upon the stand and refused to answer, for striking out his evidence altogether. The inquiry was in no way pertinent or material The witness could not be impeached in that way. The determination of the issues in the action did not depend on his "story being believed in regard to these collateral and irrelevant matters, nor did it require that the court and jury should be entertained with the history of the witness' life in its minutest particulars. As well might the plaintiffs' counsel have insisted that the testimony of the principal witness for the defense, who was also a foreigner, should have been struck out of the case, for failing to answer or evading an inquiry as to his private life before leaving England. It will scarcely be pretended that the deposition of a witness taken on commission is to be wholly suppressed for the reason that there has been a failure to answer fully all the impertinent and immaterial interrogatories that the ingenuity of counsel may suggest.

The ninth cross-interrogatory required Oltman to answer as to the business in which, after May 1850, Martin and Valton were engaged, of whom they bought, and to whom they sold, to state the names of both, and what they bought and sold. Oltman had answered, to previous interrogatories, that after May, 1850, the firm of Valton, Martin & Co. were engaged in the grocery and commission business in Albany; that in July, 1850, he first went into their employ as porter, remaining until the latter part of August; that this was the first he knew of the firm, that he was then in New York, until the fore part of September, and until after the death of Schumacher, when he returned to Albany, and remained in the employment of the firm as porter until March, 1851. He was then inquired of as to the business Martin & Valton were engaged in after May, 1850, and required not only to describe this, but to name the persons of whom they bought, and to whom they sold. His answer was that he knew nothing of the business of the firm

until after the forepart of July, 1850. As the interrogatory was of the most comprehensive character, it is not probable that it could have been answered fully by anybody, much less by a mere porter in the store of Valton, Martin & Co. But he might have stated that he had no knowledge respecting the names of those with whom the firm dealt, or all or any of the articles which they bought or sold. But it is said because this was not done that the answer was palpably and intentionally evasive of proper and material interrogatories, (not that there was a refusal to answer,) and that the court should have adjudged such intention and suppressed the deposition. But I do not think so. The business in which Valton & Martin were engaged after May, 1850, so far as it came under the knowledge of the witness, had been previously given, and he had already stated that he knew nothing of it until July, 1850, nor after March, 1851. It was in no sense pertinent to the issues to be tried, to know with whom Valton & Martin dealt, or the names of their customers, or to have a specification of the articles which they bought or sold. Besides, if material, these were matters purely collateral and incidental, and in no manner affecting the main point of Oltman's testimony, and which could without difficulty be proved by other witnesses. But the whole interrogatory was impertinent and immaterial. It was not a ground of defense in the action, either made so by the pleadings or proof, that though Martin and Valton pretended to be engaged as liquor dealers, their real business was to practice a fraud upon the defendants. The whole proof showed that there was no doubt as to the kind of business in which they were engaged; and if Martin and Valton had contemplated this as a mere show, and kept up the farce for eight months after the liability of the defendants had been fixed, if liable at all, it could have been no defense, unless Schumacher had been shown to be connected with the plot to defraud. What Martin or Valton contemplated or pretended, or what business they were engaged in, apart from Schumacher, was of no importance. Indeed, it was not at all material with whom the firm dealt, or what, particularly, they bought and sold. These inquiries could have no

bearing upon the question of a conspiracy on the part of Valton, Martin & Co. to defraud the defendants by procuring the policy, and then murdering or secreting Schumacher, that the surviving conspirators might enjoy the fruits of the diabolical fraud. Had Oltman been on the stand and an interrogatory respecting Martin & Valton alone, so general in its character, and extending beyond the period of Schumacher's alleged death, been propounded to the witness, I do not think upon his refusing to answer more fully than he did, that I should have been justified in striking out the whole of his testimony. It would have been an unsatisfactory reason for depriving the plaintiffs of the testimony of one of their witnesses because of a refusal to answer an interrogatory as to matters having no direct bearing upon the issues on trial. But still less satisfactory would be the reason, where, as in this case, there was no direct refusal, and whether the witness mistook the tenor of the inquiries or intentionally evaded answering was not clearly apparent.

I cannot bring my mind to the conclusion that there was any error in refusing to suppress the deposition, that should constrain us to grant a new trial.

2. The agent of the defendants at Albany, and through whom the policy was procured, was put upon the stand as a witness for the defendants, and among other things, testified that on the 7th of September, 1850, he heard of Schumacher's death; that Martin told him there was a person at the store that could tell him all about it; that he accompanied Martin to the store and saw Oltman, and asked him how the death occurred. The defendants then offered to show, by the witness, what Oltman said, in the presence of Martin, about the death of Schumacher. The plaintiffs objected to the evidence of Oltman's declarations, and the objection was sustained. Upon what principle they were entitled to the declarations of Oltman, or to the details of a conversation between their agent and Oltman, the plaintiffs did not inform the court on the trial; and so little confidence had they in the exception, they did not even urge it as a point to be considered on this motion. They had neither attempted nor laid any foundation for im-

peaching the witness by showing contradictory statements made by him as to a material fact. Oltman had not been interrogated respecting the conversation at the store of Valton, Martin & Co. My brother Harris is mistaken in supposing that Oltman had been fully interrogated as to what he had said on that occasion. After the offer was excluded, the defendants' agent testified that on the afternoon of the same day, Oltman went with him to an attorney's office, and he was there from an hour and a quarter to an hour and a half; and on his cross-examination he stated that the attorney questioned Oltman first, and then his brother took it up; he (Lacy) took minutes of his testimony, and so did the attorney, and he (Lacy) saw those minutes only a day or two before the trial. In the eleventh cross-interrogatory, Oltman had been asked if he did not make to Lacy or the attorney a statement of the occurrence, and the twelfth cross-interrogatory was directed to some of the particulars of the statement made at the attorney's office. To this he answered that he did not know what he had stated to them. Oltman, in answering the eleventh interrogatory, said that he first saw the defendants' agent in the store of the firm; that he asked him some questions, and then told him he was going to take him before the insurance company for examination; and he did take him to the attorney's office; but Oltman did not attempt to state the conversation at the store, or declare his want of recollection of the questions propounded to him on that occasion, or the answers given. Indeed, from the form of the offer it is quite apparent that the defendants' counsel supposed that the evidence was admissible, not because a foundation had been laid by previous interrogation of Oltman, to show that he had made contradictory statements, but because Martin was present at the time the declarations were made; and they did not even offer to show that Martin heard the conversation, or that though present, he must, from his position, necessarily have heard it. The offer was in the most general form, and nothing was stated to show the relevancy of the proposed proof. Under such circumstances, I cannot see that there is a reasonable ground, now, for imputing error in excluding the offered evi-

dence of Oltman's declarations. (*Fairchild* v. *Case*, 24 *Wend.* 381, 384.)

3. The defendants' counsel submitted eleven distinct propositions, with the request to charge each as proposed. The court refused to charge upon all the propositions in the *form* presented, except in respect to the first proposition. The fourth request was, that if the jury should find that Martin and Valton, or either of them, procured or paid for this policy, for their or either of their benefit, though with the assent of Schumacher, then the policy was void, as being a wager policy. This the judge declined to charge, and I think he might safely have put his refusal upon the ground that there was no question of the kind in the case. The answer of the defendants did not allege or set up any matter or thing, showing the policy to have been void under the statute against wagers; nor was it pretended that Martin and Valton, or either of them, procured or paid for the policy, for *their* benefit, with the assent of Schumacher; even if the proof of those facts would have made it a gambling or wagering policy within the statute. There was no proof except a feeble effort of the defendants' agent, evidently thought of long after the transaction occurred, to give it such a coloring, that Martin or Valton, or either of them, were the persons really effecting the insurance, and not Suhumacher, or that Schumacher was put forward by Martin as the mere instrument through whom the statute against wagers might be evaded. Even this effort conflicted with all the other evidence in the case, written or unwritten, with the acts of the defendants, and even of the agent himself. There was no sufficient evidence to warrant the jury in finding that either Martin or Valton, with the assent of Schumacher, procured the policy for the exclusive benefit of either. Indeed, the evidence showed a state of facts directly hostile to this theory. Schumacher was the person with whom the defendants contracted, and the legal presumption is that the policy was for his benefit, and not for that of any other person. He had an insurable interest in his own life. No use by him of the policy, *subsequent* to the contract of insurance, could convert it into a wager policy. If valid in

its inception he might dispose of it as he pleased. I do not understand that there can be a wager policy within the statute, unless the contract of insurance is made with a party who has no insurable interest in the life insured; and that the term can never apply when the policy is issued to the party whose life is insured, and when thus the contract is made directly with him. (*Peake's Nisi Prius Cases*, 150. *Godsal* v. *Bolden*, 9 *East*, 72. *Lord* v. *Dall*, 12 *Mass. R.* 115.) Schumacher being the person with whom the defendants dealt, (and they assumed not to deal with any other,) he had confessedly an insurable interest, and no arrangement for the future disposition of the policy, made with a third party, either before or after it was obtained, certainly not afterwards, could make it a wager policy. Martin or Valton might have contemplated the securing of a subsequent interest in the policy, but if Schumacher was at all interested at the inception of the contract, such contract could not be void, for the reason that the statute against wagering had been violated. Schumacher, at the time the policy was procured, may have possessed but small means; Martin may possibly have advanced the money for the payment of the first premium, but if it were so, the defendants contracted with Schumacher; he was exclusively the party insured. The policy was made in whole or in part for his benefit. It was optional with him whether Martin or Valton should ever have any interest in it; and indeed, by subsequent arrangement, they were excluded from all interest, except upon the happening of the contingency of Schumacher's dying unmarried, during the continuance of the copartnership. It was manifestly, therefore, no wager policy. To have made it such, Martin or Valton, without any pecuniary interest in Schumacher's life, must have insured it, for their exclusive benefit; and it is even doubtful—the policy not having been issued to or the contract made with them—whether the defendants could avoid this contract upon the ground that it as prohibited by the statute against wagers. In the case of *Wainwright* v. *Bland*, (1 *Mood. & Rob.* 481; *same case*, 1 *Meeson & Welsby*, 32,) the policy was issued in the name of Helen F. P. Abercrombie, who was an orphan, and resided

with the plaintiff, a near relative. Her only means of subsistence was an annual pension of ten pounds. At the trial, it clearly appeared that the policy was effected by her, by the persuasion and for the benefit of the plaintiff and his wife, who was the half sister of the assured; and that the premiums were paid by the plaintiff. At her first attendance at the company's office, with Mrs. Wainwright, she represented that the insurance was intended to secure a sum of money to her sister, which she should be able to do if she outlived the term of two years; and that on being asked by the actuary whether she had effected insurances with any other office, she answered, "I wish to insure £5000, but as your office only takes £3000, I shall propose £2000 to some other office." It was proved that she had *previously* effected insurances, with various offices, all of them for a period of two years only, to the amount in the whole, of £11,000. On being informed subsequently, by the actuary, that the directors were much displeased at her not answering his former question in a straightforward way, she said, "I know very little of the business myself; I do as my friends direct me." She died suddenly, some two months after effecting the insurance, having by her will bequeathed the benefit of her policies to her sister, and appointed the plaintiff her sole executor. The plaintiff, as her executor, swore her personal property not to exceed £100; and it was proved that she was in fact in indigent circumstances, and without the means of paying the premiums. Lord Abinger left it to the jury to say, *first*, whether the assurance was effected by the deceased *bona fide* for her own benefit, or as the agent of Wainwright; *secondly*, whether the false representations made by Miss Abercrombie related to a matter material to be known by the defendants as insurers. The jury found that she effected the insurance as the plaintiff's agent, and for his benefit, and that the false representations were on material points; and a verdict was thereupon entered for the defendants. On the motion for a new trial, in the court of exchequer, the rule was refused, on the ground that the policy was avoided by the false representations, both Lord Abinger and *Parke, B.* conceding there was doubt on the other

point. So that in a case baldly showing that the insurance had not been effected *bona fide* by the person whose life was insured, for her own benefit, and where the jury found that she acted in obtaining the policy, not for herself, but as the agent of another, and for his benefit, it was doubted whether the policy was thereby avoided. The court was unwilling to rest its decision on this ground, or to hold that a person cannot insure his own life, for the benefit of another who has no insurable interest, and who himself pays the premium; or that a contract made and a policy effected under those circumstances, falls within the statute against wagers, and that such a contract and policy may be avoided. Our statute does not define what shall be a wagering policy, but in terms inhibits courts from construing it so as to include within its operation "insurances made in good faith for the security or indemnity of the party insured," and that the section declaring void "all contracts for or on account of any money or property or thing in action, wagered, bet or staked," might not receive too enlarged a signification, expressly, by a succeeding section, provides that it shall not be extended so as to prohibit or in any way affect insurance contracts made in good faith, for the *security* or *indemnity* of the insured party. The statute nowhere declares that only insurance contracts of the latter description shall be valid. The mischief against which it was exclusively aimed was wagering, "made to depend upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever," (1 *R. S.* 662, §§ 8, 10.) It is only when an insurance contract falls within the category of a mere wager or bet—a simple gaming adventure—that the statute can even by construction apply. It is a question of legal construction always, whether an insurance contract comes within the purview of the statute against betting and gaming. Courts have held that where A. insures the life of B., having no pecuniary or other insurable interest in such life, it is a gaming transaction merely, and being forbidden, any contract for or on account thereof is void; but it has never been adjudged (at least no such case has come under my knowledge,) that where a party insures *his own life*, even for the benefit of

another, the latter advancing the money to pay the premium, such contract is void for the reason that the statute against betting and gaming has been violated. Nor have I ever before heard it pretended that the insurer could avoid his contract made with the person whose life was insured, and who had an unquestionably insurable interest, because the latter chose to insure for the benefit of a friend, even though that friend advanced the premium, and may have urged the making of the contract; and this too upon the ground exclusively of an alleged evasion of the statute against wagers. In *Lord* v. *Dall*, (12 *Mass. R.* 115,) a brother contracted with an underwriter, giving his own note for the premium, and took the policy in the name of his sister, and for her benefit. She was a person of no property, and at the time of the insurance was entirely dependent for subsistence on her brother. Yet it was not pretended that the policy was void for the reason that it was procured and paid for by the brother. But a question was raised, which was one of law purely, whether she had an interest in the subject matter insured, else otherwise, as was said by the court, it would be a mere wager policy.

It is to be observed, that in the case at bar the fact was assumed by the defendants' counsel, that Martin & Valton had no insurable interest in the life of Schumacher, (an assumption not sustained by the evidence,) and assuming this, the judge was asked to instruct the jury that if they should find that they, or either of them procured or paid for this policy, (that is, the one on Schumacher's life, and which the evidence of the defendants showed that he had applied for and obtained,) for their or either of their benefit, though with the assent of Schumacher, then the policy was void as being a wager policy. The request was, substantially, that the judge should charge the jury that either the procurement of the policy by Martin & Valton, for their benefit, *or* the payment of the premium by them, with the assent of Schumacher, constituted the policy which had been applied for by and issued to the latter, a wager policy, and rendered it void. In the face of the defendants' own evidence that Schumacher applied in writing for the policy, that

it was issued to him, and that the defendants receipted the premium as being paid by him, I was asked to submit the question of fact to the jury whether Martin & Valton, or either of them, had procured or paid for the policy for their joint or separate benefit, there being no evidence whatever connecting Valton with its procurement, and none really connecting Martin, except the fact alleged by the defendants' agent, that Martin originally suggested the insurance, and accompanied Schumacher when the application was made, and when he was examined by the defendants' examining physician. And further I was asked to allow the jury to speculate on the question whether Martin & Valton did not really pay the premiums, because the defendants' agent had sworn that Martin had handed him the money, and a hotel keeper had testified that Schumacher proposed at one time, in New York, to have Valton become responsible for his board; though it was shown that the premium for the second quarter, which Lacy testified that he *understood* had been left at his house by Martin, in his absence, had come from Schumacher himself. And further, permitting the jury to roam in the region of conjecture and speculation, should they finally conclude that the whole thing was a device of Martin & Valton to obtain an insurance upon Schumacher's life, with his assent, for their benefit, I was to instruct them that the policy issued to Schumacher was, in law, a wager policy, and being void, their verdict must be for the defendants. Either the procurement of the policy or the payment of the premiums, if they or either of them contemplated a benefit from the insurance, according to this theory, made the transaction a forbidden wager, and the instrument issued to Schumacher *ipso facto* a wager policy. My brother, Harris, is not inclined to go to the extent of holding that, in law, it would be what has been heretofore denominated a wager policy; but he thinks the transaction would be palpably an attempt to *evade* the statute against betting and gaming, and for that reason the jury should have been told that the policy was to be avoided. But if this were the law, (of which I entertain grave doubts,) I was not requested thus to instruct the jury. If the question had been upon an evasion of

the statute, there would have been still a further question of fact for the jury to find, viz: an intention of the assured to evade it.

The policy issued to Schumacher, and upon which the action was brought, was in no legal sense a wager policy. Nor, had the jury found the facts that it was issued to Schumacher by the procurement of Martin or Valton, for their exclusive benefit, or that the premiums were paid by them, would it have been invalid. Besides, there was no competent evidence in the case to sustain such a finding, or to justify the court in submitting the question of an attempt to evade the law against wagers. No such issue was made by the pleadings, and none such was tried. It is quite probable that Schumacher, at the time of effecting the insurance, was possessed of but little means. It required but little, as the quarterly premium was less than seventy dollars. It may be that Martin urged the making of the contract, and aided in its successful completion; but after all, the insurance was effected by Schumacher, not as the agent of Valton & Martin, and for their exclusive benefit, but for the benefit, in part at least, of the party whose life was insured. It is not very difficult, from the evidence, to discover the motive which induced the making of the contract. Martin, Valton and Schumacher proposed to form a partnership in the business of liquor dealers. The two former alone possessed capital to any extent; but Schumacher's services were required, as he was skillful in what is termed mixing liquors. He, though advancing no capital, was to share equally in the profits, from the beginning. In lieu of capital, and as a security or indemnity to his copartners, an insurance was effected on his life; and with the understanding that if he should die, unmarried, during the continuance of the copartnership, the benefit of the policy should go to the survivors of the firm. Martin and Valton were men with families; Schumacher was single. If he married, his copartners were to take no benefit from the insurance. He was young and healthy; and as the defendants' examining physician certified, "a good risk," and one which he recommended them to accept. The defendants' agent was eager to obtain the risk,

and abated not a jot, though believing Schumacher, from his dress and demeanor, to be the porter, and not a partner in the firm. The defendants took the risk, and received the first quarterly premium. In August, 1850, another premium was received, which extended the policy to the 15th of November, 1850; and there is no reason to suppose, from the conduct and acts of the agent, that had Schumacher survived to the latter period, there would then have been any attempt to repudiate the contract, or that he would not have receipted the premium, then payable by its terms. But Schumacher, as was alleged, was drowned in September, 1850, and while the policy was in force; and from thenceforth the defendants refused to perform their contract, doubting the death of Schumacher, but if dead, alleging as a principal reason for refusal, not that it was a wager policy, or that the statute against wagers had been intentionally evaded—not that in fact it was the policy of Martin & Valton, though issued to Schumacher, and hence void in its inception; but that it had been procured by fraud. The jury found that Schumacher was drowned in September, 1850, and that the policy was not procured by fraud. They found in favor of the plaintiffs upon all the issues made by the pleadings. That verdict is not against evidence, and though the amount in controversy be large, the defendants should be held to their contract. No vague suspicion of unfairness should induce a struggle on our part, after the issues of fact have been adjudged in favor of the plaintiffs, to search out some legal "loop hole," through which the defendants may get the case to another jury.

With an anxious desire to correct any error of law that I may have committed on the previous trial, I have not been able to persuade myself that those suggested by my brother Harris, were errors. I shall, therefore, vote for denying a new trial.

WATSON, J., concurred.

HARRIS, J., (dissenting) This case is characterized by a degree of novelty far beyond any thing of the kind with which I have before met. Some of the circumstances are so strange, indeed that they demand the most active scrutiny. The prin

cipal actors, Valton, Martin, Schumacher and Oltman, were all Germans. About the 1st of May, 1850, Valton, Martin and Schumacher made their appearance in Albany, and pretended to engage in the liquor business, as copartners. Martin had, indeed, made application for a policy of insurance for $10,000 upon the life of a friend of his partner as early as February or March in that year, but where he then resided, or how he came to make the application, does not appear. Of the previous history of the parties we learn but little from the case, and that, chiefly, from the testimony of Oltman. Valton, who had been a tanner, and at one time had kept a tavern in Germany, came to New York in January, 1848. He lived with his son-in-law, who kept a grocery and liquor store in New York, doing nothing. Martin, according to Oltman's testimony, had traveled in Germany, taking orders for liquors, cigars, &c. When he came to this country does not appear, but Oltman speaks of having seen him in New York three years before the trial. He told Oltman that he lived in the upper part of New York and sold liquor, but Bussing, Valton's son-in-law, says that he had lived in New York eight years, and that during that time Martin had not been in business there. Schumacher, it seems, was from Bremen. Oltman says he knew him there more than twelve years ago. He saw him often "*at the public houses, nights*," but never at his place of business, though he thought he was a clerk or bookkeeper in a wine store. He told Oltman that he came to this country ten years ago, but where he had been, or how he had been employed, we are not informed. The first we hear of him in America is, when he made his appearance in Albany in May, 1850, as a member of the firm of Valton, Martin & Co. The account which Oltman gives of himself is, that in Germany he had been a clerk in a court of justice, and when traveling he mixed liquors. He came to this country, late in the year 1849, and was without employment until March following, when he hired himself to a farmer on Long Island for a year, at *five* dollars a month. His employer says he found him a little *tricky*, and on the first of July he left and came tc Albany, and became a porter for the firm of Valton, Martin &

Co., receiving wages at the rate of $15 per month and boarding with Martin. He left Albany in March, 1851, and went to Milwaukie. From that time to September, 1852, when he was examined upon commission, at La Porte in the state of Indiana, he had been drifting about, remaining but a few weeks in any single place, and without any steady employment.

Whether any of the parties had any money when the business was commenced at Albany, does not appear. The articles of copartnership do not require either party to furnish any capital, and there is no evidence that any was in fact contributed. Mr. Tracy, of whom they hired their store, at a rent of $250, and whose place of business was opposite theirs, says they appeared to be doing a *limited* business. He had dealings with them to the amount of five or six hundred dollars, selling them goods upon a credit of three months. Mr. Lacy, whose office was also opposite the store, had his attention frequently directed to it, and saw that little or nothing was going on there. He saw a few barrels lying there, and occasionally saw Schumacher go out with demijohns and baskets of liquor. That three partners, engaged in such a business, should require the services of a man like Oltman, as a porter, especially when Schumacher, according to the evidence, continued, as well afterwards as before, to act as the porter of the establishment, is a little remarkable. Valton spent much of his time in New York, and the only business in which Martin is shown to have been engaged was that of obtaining and securing for the benefit of himself and Valton this large policy upon the life of Schumacher.

When Schumacher finally left Albany, or under what circumstances he left, the case does not disclose. Bussing speaks of having seen him at his store several times—he mentions three or four occasions—between the latter part of May and the middle of August. That he was destitute of money appears from the fact that when, on the 23d of August, he went to the Shakespeare Hotel to board, he proposed to pay for his board in advance, as he had no baggage, and said he would fetch the money from his *boss*, referring to Valton. That he had been staying in New York before he went to the Shakespeare Hotel, appears

from the fact that the letter which purported to enclose to Martin the second quarter's premium upon his policy, bears date, and was postmarked in New York two days before. Nor is it very likely that he would have had occasion to send back such a letter, if he had himself but just before left Albany. What he was doing all this while in New York does not in any way appear, except that Oltman says he told him he went to New York to procure a store for the firm. That this was in fact his business, there is not much reason to believe. There is no evidence that the firm contemplated either a removal to New York, or the establishment of a branch of their business there. And, besides, Valton was already there, and had been for a considerable part of the summer, and if a store was desired, he would have been, it would seem, quite competent to obtain it.

Again; it is a little singular that when Valton and Schumacher were both in New York, Oltman too should take occasion to go, and to remain there for several days. He says he went to look for a *friend* that he heard was to be there. Whether that friend was Schumacher does not appear. At any rate, he was so fortunate as to find him standing upon the wharf, upon his arrival, and we hear nothing more of any other friend. And then, the incidents connected with the drowning, as they are related by Oltman, are *marvellously strange*. The very proposition of Schumacher to go a fishing, at such a time, and in such a place, and under such circumstances, is strange. The account given by Oltman of the manner in which the accident occurred, is strange. The conduct of Oltman, afterwards, is strange. It is strange, that though he afterwards went to the man of whom the boat was hired to know if he had obtained it, he should be entirely unable to give any information either as to his name or residence, so that he may be found. It is strange, too, that after the body alleged to be that of Schumacher was found, there was no one to identify it but this same witness Oltman. It is a suspicious circumstance, too, that Martin, after having sold out his interest in the policy to the plaintiff Adams should have disappeared, and that no one, neither Bussing nor Oltman, should know what had become of him. He might have

been a most material witness in the case. There are many circumstances which need explanation, and which might, perhaps, have been explained by him, if the transaction was entirely fair.

But the evidence was fairly and properly submitted to the jury, and their verdict upon the question of fraud is conclusive. The application for a new trial must, therefore, be denied, unless some error has been committed, either in the admission or rejection of evidence, or the refusal of the judge to charge as requested by the counsel for the defendants. I proceed, therefore, to notice some of the exceptions taken upon the trial.

By the *first* cross-interrogatory, the witness Oltman was required to state what was his occupation before he left Germany, and whether he pursued one, or more, and with whom and where he lived. He was also required to describe each occupation particularly, and the places where, and the persons with whom he had pursued it. The only answer to these inquiries is, that his occupation before he left Germany was that of a clerk in a court of justice; that he lived with his mother in Ovelegonne; that he sometimes followed the mixing of liquors in Ovelegonne and in Bremen; that he did not recollect the names of the persons for whom he mixed liquors--he did it *when traveling*.

The *ninth* cross-interrogatory required the witness to state what was the business in which, after May, 1850, Martin & Valton were engaged, and of whom they bought, and to whom they sold, and what they bought and sold. To this his only answer was, that he knew nothing of their business until afer the fore part of July, 1850.

Both these interrogatories were pertinent. The witness was a stranger and a foreigner. His testimony was of vital importance in the case. His story, which must be believed, or the action must fail, was such as would not be likely to be believed without full confidence in his integrity. The plaintiffs, instead of bringing him into court, had chosen to examine him upon commission, in a remote part of the country. Under these circumstances, it was the right of the defendants to have all the tests of credibility within their reach applied to him. It was natural and peculiarly proper that they should inquire into the

history of his life. They were entitled to a full and explicit answer to each inquiry. This they did not receive. When called upon to state what his various occupations had been, and to describe each particularly, and the places where, and the persons with whom such occupations had been pursued, the only answer is, that before he left Germany he was clerk in a court of justice, and that he sometimes followed the mixing of liquors, &c. These answers are evasive and unsatisfactory. They furnish no aid in determining what the life of the witness had been, or what really had been his pursuits.

The answer to the ninth cross-interrogatory is still more objectionable. The witness had been in the employ of Valton & Martin from the forepart of July, 1850, until March, 1851. As appears from the case, he was the only person in their employ. The ground of defense in the action was, that though Valton, Martin & Co. pretended to be engaged in business as liquor dealers, their real business was to practice a fraud upon the defendants. Under such circumstances, they had a right to a full and direct answer to the inquiry of whom Valton & Martin bought, and to whom they sold, and what they bought and sold. The inquiry embraced the whole period in which they were engaged in business, after May, 1850. The answer is palpably evasive. It was proper enough for the witness to state that he had no knowledge in respect to the business prior to the forepart of July, but that certainly was no reason why he should be excused from stating what he knew about it, after that date. Had the witness been upon the stand at the time, the presiding judge would not have hesitated to require him to answer the interrogatories more fully. If he had refused, the whole of his testimony might have been stricken out.

The rule in respect to the examination of witnesses upon commission is, that the witness must answer all the interrogatories *substantially*. A failure to do so, is fatal to the whole deposition. The reason of the rule is obvious. Where a witness has assumed to withhold his answer to a part of the interrogatories, the fair inference is, that the commission has been imperfectly executed, or that the deposition does not contain the

whole truth. It is no hardship upon a party that, when he is excused from bringing a witness into court, so that he may be cross-examined in reference to his answers upon his direct examination, he should at least be required to obtain from him full and explicit answers to such interrogatories as may be prepared for his cross-examination, before he testifies. (*See Kimball* v. *Davis*, 19 *Wend.* 437; *Brown* v. *Kimball*, 25 *id.* 259; *Smith* v. *Griffith*, 3 *Hill*, 333.) It is a question to be determined upon the trial, whether the witness has omitted to answer any material interrogatory. If he has, the deposition is to be rejected, on the ground that the witness has not told the whole truth. I think the objection in this case was well taken. Upon the issue of fraud, it was clearly pertinent to ascertain the nature and extent of the business in which Martin and Valton were engaged. These were matters peculiarly within the knowledge of the witness. Appropriate interrogatories were framed to call out such knowledge, and yet the defendants have entirely failed to obtain any answer upon the subject. The commission must, therefore, be deemed to have been imperfectly executed.

I think, too, the defendants should have been permitted to show what Oltman had said in relation to the death of Schumacher. He was the only witness to prove the strange circumstances connected with that event. He had been asked in the eleventh cross-interrogatory, whether he had made a statement of the occurrence to Mr. Lacy, and in the twelfth interrogatory, whether he had stated to Mr. Lacy that they were not fishing when Schumacher fell overboard, or that he fell overboard in a fit, or that the witness fell overboard also, or that he knew that Schumacher's life was insured, or that Valton had told him so, or that Schumacher had left Albany and gone to New York to look for a place to keep a store, or that Schumacher when he was drowned had on yellow nankeen pantaloons. To all this, the witness had answered merely, that he did not know what he had stated on the subject. Mr. Lacy, being examined as a witness for the defendants upon the trial, stated that on the 7th of September, Martin came to his office, and informed

him of the death of Schumacher. Upon asking him how he ascertained it, he said there was a person at his store who could tell him all about it; that he went with Martin to his store, and there saw Oltman; that he asked him how the death occurred. I cannot see why it was not competent for the defendant to show by Lacy what Oltman then said on the subject. Martin, who was then a party in interest, had referred to Oltman for information on the subject. He was present when the statements were made. Oltman had been fully interrogated as to what he had said on that occasion, and to the whole he had simply answered that he did not know what he had said. The foundation had thus been laid for the admission of any contradictory statements which Oltman may have made when giving to the witness Lacy an account of the circumstances, immediately after the death was alleged to have occurred. I think the learned judge erred in excluding the evidence.

It was insisted upon the trial that the evidence warranted the jury in finding that, though the policy was taken in the name of Schumacher, yet it was in fact the policy of Valton & Martin, or one of them. The defendants' counsel accordingly asked the judge to charge the jury that if they should find that Martin or Valton, or either of them, procured or paid for this policy, for their own benefit, though with the assent of Schumacher, it was void, as being a wager policy. I am inclined to think the defendants were entitled to have the jury so instructed. Valton & Martin had no such pecuniary interest in the life of Schumacher as would entitle them, for their own security or indemnity, to insure his life. A policy taken in the name of either or both of them would have been void as a wager policy. (1 *R. S.* 662, §§ 8, 9, 10.) They could not, by merely obtaining the use of Schumacher's name, accomplish indirectly what they could not do directly. If the policy, from the first, really belonged to Valton & Martin, or one of them—if in fact, Schumacher never had any interest in it, then it was but an attempt to evade the statute against wagers, to take the policy in the name of Schumacher. I am inclined to think the jury would have been warranted in finding that this was so.

According to the testimony, Martin was the only man who ever interested himself to procure the policy. Long before Schumacher came to Albany, he had applied to the defendants' agent for a policy of $10.000 on the life of a friend. It was he that applied for the preliminary papers. It was he that answered the objections made by the agent, and again by the examining physician, to the taking of such a risk. It was he that, on both occasions, paid to the agent the premium of insurance. From first to last, the whole transaction seems to have been under his special management and supervision. Indeed, by the very terms of the articles of copartnership, it was only in case of a dissolution of the partnership before the death of Schumacher, or his marriage, that he could have any interest in the policy. Under these circumstances, the jury might well have found that the whole thing was designed for the exclusive benefit of Valton & Martin; that the premiums were in fact paid by them for their own benefit, and that the pretense that money had been forwarded from New York by Schumacher to pay the premium for the second quarter, when he was shown to have been so destitute that he was obliged to obtain money from Valton to enable him to pay four dollars for a week's board, was only designed to conceal the more effectually the real transaction.

Whether a person can insure his own life for the benefit of another who has no insurable interest, and who himself pays the premiums, is a question which has not been adjudged. It came before Lord Abinger twice, at the circuit, in *Wainwright* v. *Bland*, (1 *Mood. & Rob.* 481; *Same case*, 1 *Mees. & Wels.* 32,) but upon the review of the case, the motion for a new trial was decided without touching this question. In that case, the policy was in the name of Helen Francis Phebe Abercrombie. She was an orphan, of the age of twenty-one years, and resided with the plaintiff, who was a near relative. Her only means of subsistence was an annual pension of ten pounds. In October, 1830, she had, in company with the plaintiff's wife, applied for and obtained the policy in question. She had previously obtained other policies, in all amounting to £16.000.

the annual premium upon which was £200. The money to pay the premium was lent to her by the plaintiff. She died in December after she had obtained the policy, leaving a will by which she appointed the plaintiff her executor. It was proved that shortly before her death she had assigned two other policies to the plaintiff, for a nominal consideration. Evidence was also given to show that misrepresentations were made at the time of obtaining the policy, in relation to other insurances, and the object in effecting the insurance. Lord Abinger charged the jury that the question in the case was, who was the party really and truly effecting the insurance. Was it the policy of Miss Abercrombie, or was it substantially the policy of Wainwright, the plaintiff, he using her name for his own purposes? If it was the policy of Miss Abercrombie, effected by her for her own benefit, her representative was entitled to put it in force. The plaintiff might lend her the money to pay the premium, and yet the policy continue her own. But if, looking at the strange facts which had been proved, the jury should come to the conclusion that the policy was in reality effected by the plaintiff; that he merely used her name, himself finding the money, and meaning, by way of assignment, or by bequest, or in some other way, to have the benefit of it himself, then the transaction would be a fradulent evasion of the statute, and their verdict should be for the defendant. The judge then proceeded to submit to the jury the further question as to misrepresentations, and concluded by saying that the main question was, whether the policy was *bona fide* the policy of the deceased; that if it was, and no material fact was concealed from the underwriters, the verdict should be for the plaintiff; otherwise for the defendants. The jury having disagreed, the cause was again tried before the same judge. He recommended the jury to find a verdict for the defendants, if they thought the policy was really and substantially the policy of Wainwright. the plaintiff, he putting forward Miss Abercrombie as a mere instrument, and effecting the policy in her name, with the design of getting the benefit of it himself either by will or assignment or by some other means; or if they thought the

misrepresentations as to the motive of the assured in effecting the policy, or as to the policies already effected, were misrepresentations of facts material to be known by the insurers. The jury found a verdict for the defendants, and added that they were of opinion that the policy was substantially the policy of Wainwright himself, and also that the mirepresentations were of facts material to be known by the insurers. Upon the motion for a new trial, Lord Abinger himself, and Park, B., both said there might be some doubt upon the first point; but, without giving any opinion upon this question, the verdict of the jury was sustained upon the point of misrepresentation.

The question, therefore, cannot be regarded as having been determined by express adjudication. But, it seems to me to be within the plain meaning of the statute, and obviously within the mischief contemplated by the legislature. The object of the statute was to prevent wagering and speculative policies by third persons having no interest in the subject of insurance. "Insurances made in good faith for *the security or indemnity* of the party insured," are alone declared to be valid. If this policy was, in the language of Lord Abinger, really and substantially the policy of Valton & Martin, or one of them, they putting forward Schumacher as a mere instrument and effecting the policy in his name, with the design of getting the benefit of it themselves, the contract is not within the exception of the statute protecting insurances made in good faith for the security or indemnity of the party insured. There was neither security nor indemnity in the case. It was a mere wagering policy and within the prohibition of the statute (*See* 3 *Kent's Com.* 369, *note d.*)

The motion for a new trial on the ground of surprise could not have prevailed. Such a motion is properly made at a special term, as a non-enumerated motion. If the court deem it proper to have it heard with a motion for a new trial upon a case or exceptions, an order may be made to that effect. In this case, the motion was made at a special term, at the same time the motion was made upon the merits. It is too late now

when the question comes up on an appeal from the order, to insist that the motion was irregular.

But upon the merits, the motion could not be granted. The defendants' counsel, according to his own statement, instead of requiring the attendance of Adams and Parke by subpœna, thought fit to rely upon the assurance of Adams that he would attend the trial. It is indeed, a little singular that both Adams and Parke, situated as they were in reference to this action, after attending upon the trial two days, should have business which required that they should absent themselves, while the evidence was being produced. Such an occurrence was undoubtedly a surprise upon the defendants' counsel. But having failed to put them under legal obligation to attend, they are chargeable with a want of legal diligence, which is a sufficient answer to a motion for a new trial on the ground of surprise.

But, for the reasons already stated, I think there should be a new trial. Nor do I regret to find myself brought to this conclusion. The novelty of the case; the mystery that still seems to envelop some of its principal features; the character and circumstances of the chief actors in the transaction, and especially the principal witness in the case, all tend to encourage the belief that the ends of justice may be advanced by allowing the parties to present the facts anew before another jury.

New trial denied.

[Albany General Term, December 4, 1854. *Wright*, *Harris* and *Watson* Justices.]

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The La Farge Fire Insurance Company *vs.* Bell and others

On the 10th of September, 1850, B. executed a mortgage to C. to secure the payment of $4,500 and interest, on four blocks of land in the village of Yonkers, bounded and described by the outer limits of the whole together, and also as lots 1, 2, 33, 34. This mortgage became due, according to its condition, by a default in the payment of interest. On the 23d of September, 1853, B. the mortgagor, and his wife, conveyed to G. B. by deed dated August 30th, but not acknowledged until September 22d, 1853, four lots, Nos. 95, 96, 97 and 98, part of the original lot No. 33 included and described in the mortgage previously given to C. By this deed these four lots were to be subject to $640 of the C. mortgage. This deed, though actually delivered about the time of its acknowledgment, was not recorded until February 27, 1854. On the 25th of January, 1854, B. and wife executed two mortgages to the plaintiffs, both dated December 2, 1853, and recorded January 27, 1854. One of these was given for $6000 upon the original lots 1 and 2, embracing 14 of the small lots, Nos. 81 to 94 inclusive. The other was for $4000, and was upon all of the original lots 33 and 34 to which B. then held title; i. e. all of those lots except the subdivision lots Nos. 95, 96, 97 and 98, which had been sold and conveyed to G. B. In March, 1854, B. and wife executed a mortgage to McK. for $2000, upon these lots Nos. 95, 96, 97 and 98, and also upon another lot. The plaintiffs took an assignment of B.'s first mortgage to C., and brought a suit for the foreclosure of all three of the mortgages executed by B. The amount due on these mortgages not being disputed, the only question was as to the order in which the various lots should be sold, or their proceeds applied to satisfy the incumbrances.

Held, 1. That the plaintiffs became purchasers of an equitable interest in all the residue of the lands mortgaged by B. to C., including lots 95, 96, 97 and 98, and as to that interest, viz: the right to have the first mortgage charged on those lots, that the conveyance to G. B. was void because it was not recorded.

2. That the mortgagee C. and his subsequent grantees, or persons standing in that relation—as G. B. and his mortgagee McK.—were entitled to the benefit of any probable or possible surplus after applying the proceeds of that portion of lots 95, 96, 97 and 98 included in the mortgages to the plaintiffs, to satisfy those mortgages.

The decree therefore provided for the sale, first, of the land embraced in the mortgage from B. to C., except the lots 95, 96, 97 and 98, and for the sale of this in two separate divisions, according to the two second mortgages held by the plaintiffs. After reserving the amount of these two second mortgages, each out of the proceeds of its own parcel of these lands, the residue was directed to be applied to the satisfaction of the original C. mortgage. And if the residue of such proceeds, after deducting the amount of the second mortgages, should not be enough for that purpose, then, and before applying the amount reserved for the two second mortgages, the lots Nos. 95, 96, 97 and 98 were

ordered next to be sold and the proceeds applied, and then the proceeds of the other parcels retained were to be applied ratably, to satisfy the C. mortgage. If any thing should remain, after this was paid, each parcel was to be charged with its own mortgage. And if there should be a surplus, after satisfying the three mortgages held by the plaintiffs, in the order and manner of applying the proceeds of the various parcels, as before directed, it was ordered to be brought into court for a proper distribution.

The right which a grantee with warranty of a portion of mortgaged premises has, to have the mortgage satisfied first out of the part remaining unsold, is an equitable and not a legal right; and therefore, any rights which the holder of the first mortgage on the whole premises may have, are not affected, nor are any obligations imposed on him, unless he has notice of the subsequent partial alienation.

The holder of the first mortgage has two funds for the payment of his debt—the portion of the mortgaged premises sold and conveyed, and the residue remaining in the mortgagor—to either of which he may resort.

The mortgagor having aliened a part, covenanting to protect his grantee against the mortgage, the grantee becomes a surety for the mortgage, as to the portion of the premises conveyed to him. He has a right, therefore, as against the mortgagee, to insist that he shall not deal with the lands not aliened, which are by the covenant of the mortgagor with him the primary fund for the payment of the debt, so as to increase his own liability, or diminish that fund; provided however, the mortgagee have notice of the facts out of which these equities arise.

An insurance company, taking mortgages subsequent in date to an unrecorded deed of the same premises embraced in the mortgages, will not be charged with constructive notice of such deed, by the fact that the grantor and mortgagor was, at the date of the deed, and at the time of executing the mortgages, a director in the insurance company.

ACTION for the foreclosure of mortgages. The material facts are detailed in the opinion of the court.

John M. Mason, for the plaintiffs. I. The principle that when mortgaged property is aliened by the mortgagors, at different times, to different parties, such mortgaged property must be sold under the first mortgage in the inverse order of alienation, is thoroughly established. If authority is required on that point see *Schryver* v. *Teller*, (9 *Paige*, 173;) *Guion* v. *Knapp*, (6 *id.* 35;) *Kellogg* v. *Rand*, (11 *id.* 59;) *Stuyvesant* v. *Hall*, (2 *Barb. Ch.* 151.)

II. The land is not only to be sold in the inverse order of alienation, but the mortgage is actually *chargeable*, and in

equity *charged* upon the remaining mortgaged premises at the time of the alienation of a part. See above cases, particularly *Schryver* v. *Teller*, (9 *Paige*, 173.)

III. A mortgagee is an alienee, to the extent of his mortgage, quite as much as a grantee. (*Kellogg* v. *Rand*, 11 *Paige*, 59, 64.)

IV. If there had been no deed from Bell to Bancker the mortgage of Bell to Candee, on the whole property, would immediately upon the mortgages by Bell to the plaintiffs on the 24 lots, become chargeable on the four lots, 95 to 98. (1.) The deed to Bancker, although given before the mortgages, yet not being recorded till after the mortgages, operates in the same way upon the equitable rights acquired under these mortgages as it would had it been upon the same real estate. (2.) The whole object and intent of the recording acts is to protect subsequent purchasers and incumbrances against previous deeds, mortgages, &c., which would affect the rights of the subsequent purchasers or incumbrancers. (*Stuyvesant* v. *Hall*, 2 *Barb. Ch.* 158, *and cases there quoted.*) (3.) If there is any doubt as to the protection afforded by the strict construction of the recording acts, the court of chancery will construe that act in such a way as to afford protection to those who have equitable rights under the established law of the court. (4.) When the plaintiffs took their two mortgages Nos. 2 and 3, they had notice of the existence of the mortgage No. 1, for $4500, covering the whole 28 lots. They had no notice of any subsequent incumbrance on lots 95 to 98, the deed to Bancker not being on record. On the recording of their mortgages Nos. 2 and 3, January 27, 1854, the mortgage No 1, by operation of law, and by the principles established by the court of chancery, became *on that day* chargeable and charged upon the lots 95 to 98, to the whole extent of the mortgage, ($4500,) in the same way as if it were a new mortgage, (so far as Bancker was concerned,) executed and recorded on that day. (5.) If then the recording act is construed strictly as to the words "the same real estate," the "conveyance" to Bancker "is void as against" that mortgage or the right of other parties affected by it; it being "a subsequent incum

brance" to the full extent of $4500 recorded prior to the deed to Bancker. (6.) If this doctrine is not correct the grossest frauds may be practiced under the "protection" of the recording act; as for instance: A. owning lots 1 and 2, each worth $5000, mortgages them to B. for $2000. C. wishing to buy lot 1, ascertains by examination of the record that the only incumbrance on the two lots is $2000. He knows that lot 2 is ample security for the mortgage, and that the mortgage must attach to lot 2. He pays A. $5000 for lot 1, and puts his deed on record. He then finds that A. has previously sold lot 2 to D. who has not put his deed on record, and that the mortgage for $2000, which he had supposed attached to lot 2, has attached to lot 1, because the deed to D. though not recorded is not void against him, not being on the "same real estate." The court never would permit such a fraud to be practiced under an act intended to protect against fraud.

V. There is no pretence of actual notice in this case. The property was vacant, so that there was no notice by possession. There was no actual notice to the plaintiffs. The only notice was constructive, either, 1. By the record, or; 2. By the fact that Bell was a director of the plaintiffs' company.

VI. Knowledge by Bell, though he was a director of the plaintiffs, was not knowledge to the plaintiffs. (1.) He was not an acting director. He does not appear to have had any thing to do with the business of the plaintiffs from May 10, to January 12. All these matters occurred between those two dates. (2.) Though a director for general purposes, yet in these matters his interests were opposed to the plaintiffs: he acted in a position adverse to them. *Pro tanto* his connection with the company was dissolved. If Bancker knew he was a director, he knew also that his interests were adverse to those of the company. (3.) The plaintiffs are an insurance company. Their business, as declared by their charter, is "transacting the business of insurance on dwelling houses, stores," &c. Knowledge by their directors, or one of them, is only chargeable against the company when it is directly connected with their business of insurance, and they are not chargeable with knowledge ac-

quired by their director in a matter only incidental to the general business of the company, viz: the investment of their capital or surplus. (4.) Even if it were connected with the business of insurance, the director's knowledge of a violation of the policy would not sanction such violation, nor could *his* consent give permission to violate when his interest as insured was directly opposed to that of the company as insurer.

VI. Even if Bancker would be protected under the recording act, McKnight as holder of a mortgage on Bancker's lot, taken long after all the other papers were on record, would not be protected to the same extent. *He* had notice of the existence of all the deeds and mortgages, and was chargeable with such notice.

A. J. Vanderpoel, for the defendants McKnight and Bancker I. By the common law every deed took priority from its date, or its delivery: it was valid as to all persons. (*Cruise tit.* 32, *ch.* 29, § 1.) Since the registry acts, the deed is in no case void; it is always good as against every person, except "a subsequent purchaser in good faith and for a valuable consideration of the same real estate or of any portion thereof, whose conveyance shall be first duly recorded." (2 *R. S.* 162, § 1, 4*th ed. marg* 756.) It has therefore never been suggested that the deed unrecorded was not good as against the grantor and his heirs. (*Jackson* v. *Burgott*, 10 *John.* 461.) So an unrecorded deed is held to be good as against a subsequent purchaser who makes no new advance on the faith of his purchase; e. g. one who buys and applies the purchase on a precedent debt. (*Wright* v. *Douglass*, 10 *Barb.* 97. *See cases, p.* 107.) So the recording of a second mortgage is not constructive notice to the mortgagee in the first mortgage. (*Stuyvesant* v. *Hall*, 2 *Barb. Ch.* 151.) As against such persons, a purchaser is under no obligation to record his deed, and no new right or new equity can be claimed by the omission to record. It is only those persons who are mentioned in the first section of the statute cited who can assert any right or equity as against the holder of the unrecorded deed.

II. The second mortgages mentioned in the complaint do not

cover or affect the four lots conveyed by Bell to Bancker. It was therefore a matter of no consequence to the plaintiffs whether the deed from Bell to Bancker was or was not recorded. The plaintiffs were not "purchasers of the same real estate or of any portion thereof," which was conveyed to Bancker. It is exclusively persons answering this description who are protected by, and are within, the registration act. (2 *R. S.* 162, § 1, *4th ed.* 1 *id.* 756, *marg. paging.*)

III. So, also, the plaintiffs, not being subsequent mortgagees of the lands included in the deed to Bancker, would not be affected by any thing contained in that deed. There was no duty enjoined upon them by statute to examine the record of that deed, and Bancker could not have claimed any right or privilege as against the plaintiffs by reason of any thing contained in his deed. The true proposition is that subsequent purchasers in good faith and for a valuable consideration are alone benefited by the registration act, so as to take preference of an unrecorded deed of the same premises, and on the other hand subsequent purchasers of the same premises are alone affected by the statute so as to be affected by a recorded deed. (4 *Edw.* 242.)

IV. The plaintiff not being within the registration act, no duty was imposed upon Bancker, and his deed was valid as against them. It took its priority from the date or delivery.

V. It being a valid deed, as against the plaintiffs, there can be no plausible pretense for granting the relief asked for by them. The major premise of the proposition on which they ask relief is that our deed is void as against their mortgage by reason of want of notice.

VI. In answer to the suggestion of the plaintiffs that if we had recorded our deed they might have discovered it and been more cautious in making their loan, we say, 1st. This is untrue in point of fact, for they have not shown that they made search for conveyances or used any diligence. 2d. There is no pretense, warranted by any proofs in the case, that Bell deceived them, or that he did not explain to them the exact condition of the property and of the conveyances. 3d. Bancker did not mean to deceive or mislead them. 4th. The complaint is bar-

ren of any averment that the plaintiffs were bona fide purchasers or mortgagees. The well established rule of equity is that a party claiming relief as a bona fide purchaser must positively and precisely deny all notice, although it is not charged. (*Frost* v. *Beekman* 1 *John. Ch.* 288.)

VII. The defendants Bancker and McKnight, (the one as holder of a valid deed and the other as mortgagee,) are entitled to have the four lots charged with only $640, and interest, until the remaining twenty-six lots shall have been sold and found in sufficient to satisfy the mortgage.

VIII. Bell was a director of the insurance company at the time of the execution of the mortgages to him; and when the rights of third persons are in question the company must be deemed to have notice.

Emott, J. On the 10th day of September,1850, the defendant Bell executed a mortgage to Edward W. Candee, to secure $4500 and interest, on four blocks of land on certain streets in Yonkers, bounded and described in the mortgage by the outer limits of the whole together, and also as lots 1, 2, 33, 34, on the map of Sampson Simpson's estate. This mortgage has become due according to its condition, by a default in the payment of interest. Afterwards, on the 23d day of September, 1853, Bell and wife conveyed to Gerard Bancker, by deed dated August 30th, but not acknowledged until September 22d, 1853, four lots, Nos. 95, 96, 97, 98, part of the original lot No. 33 included and described in the mortgage given by Bell to Candee. By this deed these four lots were to be subject to $640 of the Candee mortgage, and to no more. This deed was actually delivered about the time of its acknowledgment, but was not recorded until February 27th, 1854, and the lots remained until long after that time open, lying in common, not enclosed and not actually occupied by any one. On the 25th of January, 1854, Bell and wife executed two mortgages to the plaintiffs, both dated Dec. 2, 1853, and both of which were recorded January 27th, 1854, a month before the recording of Bancker's deed. Of these, one was given for $6000, upon the original lots 1, 2, comprehending

14 of the small lots on the map, Nos. 81 to 94 inclusive. The other was for $4000, and was upon all of the original lots 33 and 34, to which Bell then held title, that is, all of those lots except the subdivision lots Nos. 95, 96, 97, 98, which had then in fact been sold and conveyed to Bancker. In March, 1854, Bancker and wife executed a mortgage to the defendant John L. McKnight, for $2000, upon these lots Nos. 95, 96, 97, 98, and also upon another lot not part of this property, and worth about $500. The plaintiffs have taken an assignment of Bell's first mortgage to Candee, and have brought this suit for the foreclosure of all three of the mortgages made by Bell, but of course the rights of all of these parties are to be considered as if these mortgages were all represented by their original holders. The amount due on these various incumbrances is not in dispute, and the only question in the case, or which was argued at the hearing, is raised by the prayer of the complaint, and the answer of the defendant McKnight, and relates to the order in which these various lots of land should be sold or their proceeds applied to satisfy those incumbrances.

The defendants Bancker and McKnight claim that as the lots Nos. 95, 96, 97, 98, were aliened in fact before any other charge or conveyance had been made of the residue of the property by Bell, these lots should not be sold or their proceeds applied to pay the original Candee mortgage, except to the extent of the $640 expressly charged upon them by the deed to Bancker, until all the residue of the property covered by that mortgage has first been sold and applied to its payment. And this would unquestionably be the rule under the well settled principle of inverting the order in which the property has been aliened, unless that rule, or its application between different subsequent alienees depends, not merely upon the fact of the prior alienation of one parcel of the mortgaged premises, but also upon notice or knowledge of such alienation by subsequent grantees or mortgagees of the whole or any portion of the residue.

I do not think the plaintiffs can be charged with constructive notice of the deed of Bell to Bancker, because Bell was at the date of that deed, and at the date of the mortgages made by him

to the plaintiffs, a director of the company. Nothing like notice in fact is shown. Bell attended but two meetings of the board, one in May, 1853, and one in January, 1854; and it is not pretended that he gave the company, or any of its officers, actual notice of his conveyance to Bancker, which was made after the former and before the latter of these meetings. And it must be observed that the mortgages, as to which the plaintiffs are to be affected with notice of this conveyance of Bell, were made by him to them, the loan was obtained by him from them, and he was acting for himself directly and not for them, in these transactions. And if his position as a director could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it could not be so when he did not become concerned as their especial agent, or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them.

The deed from Bell to Bancker was not recorded until after the mortgages from Bell to the plaintiffs had been put on record, and no possession, or notice in fact of that conveyance, is alleged in the case, except as inferred from Bell's relation to the company; and therefore the question to be determined is whether the defendant Bancker and his mortgagee McKnight are entitled, without any proof of notice of the deed from Bell to Bancker to the holders of these mortgages on these two parcels of the property, to have all the lots not embraced in the conveyance to Bancker, including the lots covered by these second mortgages, sold, before resorting to Bancker's property to satisfy the first mortgage, according to the ordinary rule when all the conveyances are recorded or known, or when one conveyance has been made by the mortgagor. This involves the question how far the registry act applies to the case; and whether the recording of this deed of lots Nos. 95, 96, 97 and 98, if it had been made

a season, would have been notice to the subsequent grantees or mortgagees of any of the residue of the property, so as to postpone their equities to those growing out of the prior conveyance of these lots.

Of course, as between the mortgagor and his grantee of a portion of the mortgaged premises, the rule is well settled. There no question of notice can arise, and all that is to be done is to apply the equity which grows out of the relation which the parties necessarily bear to each other. But the right which a grantee with warranty of a portion of the mortgaged premises has to have the mortgage satisfied first out of the part remaining unsold, is an equitable and not a legal right, and therefore any rights of the holder of the first mortgage on the whole premises are not affected, nor are any obligations imposed on him unless he has notice of the subsequent partial alienation. The holder of the first mortgage has two funds for the payment of his debt—the portion of the mortgaged premises sold and conveyed, and the residue remaining in the mortgagor—to either of which he may resort. The mortgagor having aliened a part, covenanting to protect his grantee against the mortgage, that grantee becomes a surety for the mortgage, as to the portion of the premises conveyed to him. He has a right, therefore, as against the mortgagee, to insist that he shall not deal with the lands not aliened which are by the covenant of the mortgagor with him the primary fund for the payment of the debt, so as to increase his own liability or diminish that fund, provided however the mortgagee have notice of the facts out of which these equities arise. A release, by the mortgagee, of all or any of the property remaining in the mortgagor, after he has had notice of an alienation of a portion, is a discharge, *pro tanto*, of that portion of the premises. (*Guion* v. *Knapp*, 6 *Paige*, 42. *Stuyvesant* v. *Hall*, 2 *Barb. Ch.* 151.) But it never operates as such a discharge without such notice. If, in this case, the plaintiffs or Candee had released a portion of these premises after the conveyance to Bancker, or had covenanted not to resort to any such specified portion until after the residue, including the lands so sold and conveyed, had been applied and

exhausted, still that would not have operated to discharge Bancker, or the lots purchased by him, unless it had been done by the mortgagee after notice or with knowledge of the fact of the conveyance to Bancker.

Now at the time of the execution of the two mortgages by Bell to the plaintiffs, in December, 1853, neither the plaintiffs nor Candee, then the holder of the prior mortgage, knew that the deed of the four lots had been made to Bancker. If, therefore, on that day Candee had released from his mortgage, to the plaintiffs, the lots included in their two mortgages, or had covenanted with them that he would not seek to collect his mortgage from their lots until all the residue of the lands had been exhausted, it is plain that Bancker could never have complained of such a transaction, nor avoided the effect of it either in respect to the original mortgage of Candee or the subsequent mortgages to the plaintiffs on the lands included in them. It is true this was not done in form, but the plaintiffs took their two mortgages, knowing that the original mortgage to Candee covered much more land, in addition to that on which their security rested, and supposing that all that land remained subject to that mortgage. They therefore acted upon the faith that equity would compel the holder of the larger mortgage to resort to all the residue of the premises covered by his mortgage before resorting to that on which they loaned their money. They advanced the money, took their mortgages, and recorded them so as to give the holder of the first mortgage at least all the notice which their registry would afford, of their rights so as to affect his conscience, and create the equity of parties standing in the relation of sureties with reference to the residue of the lands. They thus became in effect sureties for the mortgagor, as to the residue of his lands, and they became such sureties without notice of the existence of any other suretiship or similar equitable rights of any other party. Thus they obtained an equitable right and created an equitable charge of that nature upon the residue of the lands included in the first mortgage, *eo instanti*. The defendant McKnight, who stands in the shoes of Bancker, by a mortgage executed to him by Bancker, sets

up an equitable right of precisely the same nature as this by virtue of the alienation by Bell to Bancker. Both Bancker and the plaintiffs occupied the position of sureties for Bell, and if either should be called to pay Bell's debt, or any part of it, out of any portion of this property belonging to him, he would be able to call upon the other for contribution, unless one of them possesses a prior equity to the other. (*Gill* v. *Lyon and others*, 1 *John. Ch.* 447.) That priority depends not only upon the actual date of the conveyances under which they hold, but also upon the knowledge, by a notice to them respectively at the time of these conveyances, of the true state of facts and of the equities arising out of them. Any other rule would produce the most serious injustice. Second mortgages upon portions of mortgaged premises are rarely taken without considering and relying upon the equity which will arise in favor of the second mortgagee to have the first mortgage charged upon the residue of the property; and if these equities could be defeated or postponed by secret conveyances, the greatest hardship and injury would take place.

The counsel for McKnight argued, with great ingenuity and ability, that the case was not within the recording act, because the unrecorded deed to Bancker was not a conveyance of the same or any part of the same premises included in the two mortgages made by Bell to the plaintiffs, (*see* 1 *R. S.* 756, § 1,) and therefore that a record of Bancker's conveyance would not have been notice to the La Farge Insurance Company, and the failure to record it could not prejudice Bancker or his grantees or mortgagees.

If I am right in the view which I have taken of this case, the only result of the learned counsel's argument upon the registry act would be to show that in all cases between subsequent grantees of property foreclosed by a prior mortgage, actual notice is requisite to create or enforce these equities of purchasers among themselves, and the record of the mesne conveyances will not suffice in its place. I think, however, this would not be a proper view of the recording act.

The obvious answer to the defendant's argument is that it is

not as purchasers of the legal estate in the lands covered by the mortgage, but as purchasers of an equity in or against the residue, or of an equitable interest in the whole of the lands included in the first mortgage including the lands conveyed to Bancker, that the La Farge Insurance Company are to be regarded, and the statute applied.

The statute (1 *R. S.* 756, § 1) provides "that every conveyance not recorded shall be void against a subsequent purchaser in good faith of the same real estate or any portion thereof whose conveyance shall be first duly recorded." By §§ 37 38, of the same title, (p. 764,) the term purchaser is declared to include every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and the term conveyance, any instrument by which any title to real estate may be affected in law or in equity. The deed to Bancker and the mortgages to the insurance company both created not only the estates they were intended to convey in the lands described and directly affected by them, but also an equitable right in the residue of the lands included in the first mortgage to Candee, to have them applied to that mortgage before resorting to the lots included in those mesne conveyances. It is with reference to their effect as creating or conveying an interest in the lands covered by the Candee mortgage, that the statute is to be applied to these conveyances. It is not a question how far the recording of the deed to Bancker might affect the title of the plaintiffs to their own land or their interest in it under these two second mortgages, but it is a question whether the insurance company have or have not an equitable right to have the first mortgage satisfied out of Bancker's land before resorting to theirs.

This right would vest in them instantly upon taking these mortgages, if these mortgages were the first mesne conveyances. It would vest by the operation of law, just as effectually as if Bell and Candee had united in an instrument assigning it to them and covenanting that the lots not mortgaged to them should assume the debt in preference to those covered by their mortgages. The La Farge Insurance Company became by this transaction, purchasers of an interest, an

equitable interest it is true, but still an interest in all the residue of the lands mortgaged by Bell to Candee including these lots Nos. 95, 96, 97, 98, and as to that equitable interest thus acquired—that is the right to have the first mortgage charged on these lands—this conveyance to Bancker was void because it was not recorded.

I have assumed that a mortgage is an alienation, and it is entirely settled that it is to be so regarded for all purposes of such questions as the present. It is however, only an alienation *pro tanto*, (*Kellogg* v. *Rand and others*, 11 *Paige*, 59,) and therefore it is, only to the extent of these two mortgages and not absolutely to the whole proceeds of the lands included in them, that the rule is to be applied in this case.

The mortgagee and his subsequent grantees or persons standing in that relation, as Bancker and his mortgagee McKnight, are entitled to the benefit of any probable or possible surplus after applying the proceeds of this portion of these lots to satisfy the two second mortgages of the plaintiffs.

The decree will therefore provide for the sale first of the land embraced in the mortgage from Bell to Candee except the lots 95, 96, 97, 98, and for the sale of this in two separate divisions, according to the two second mortgages held by the plaintiffs respectively. After reserving the amount of these two second mortgages, each out of the proceeds of its own parcel of these lands, the residue will be applied to the satisfaction of the original Candee mortgage. If the residue of such proceeds, deducting such second mortgage, should not be enough for this purpose, then and before applying the amount reserved for the two second mortgages, the lots Nos. 95, 96, 97 and 98, are next to be sold and the proceeds applied. Then the proceeds of the other parcels retained will be next applied ratably to satisfy the original mortgage. If any remains after this is paid, each parcel will then be charged with its own mortgage. If there should result a surplus after satisfying the three mortgages held by the plaintiffs, in the order and manner of applying the proceeds of these various parcels herein directed, it must be brought into court for a proper distribution.

Liberty may be reserved to the defendants, Bancker and McKnight, in case the premises in which they are interested become charged with more than the share of the mortgage assumed by Bancker according to Bell's deed, to apply for a judgment over against Bell upon notice to him or his attorneys.

[WESTCHESTER SPECIAL TERM, March 3, 1856. *Emott*, Justice.]

22 68
34 196
34a 178

BARGER *vs.* DURVIN, TAYLOR and FLAGLER.

Where the makers of a promissory note, within six years before suit is brought thereon, and before a suit is barred by the statute of limitations, assign their property to trustees, in trust for the benefit of creditors, and direct them to pay such note, among others, in full if there shall be sufficient property, and if not, then to pay a ratable dividend upon it, with other debts, and the assignees in pursuance of such direction, make a dividend of fifty per cent upon the note, and pay the amount to the holder, this payment will be treated as the act of the makers themselves, by their agent duly authorized for that purpose, and as evidence of a new promise by them to pay the note.

A payment made by a part of the joint and several makers of a promissory note, within six years before suit is brought thereon, and before a suit is barred by the statute of limitations, will not revive the debt, as to the other makers.

ACTION upon a promissory note. The defense was the statute of limitations. The opinion states all the material facts.

Mr. Coffin, for the plaintiff.

Mr. Wells, for the defendants.

EMOTT, J. Upon the trial of this action before me, without a jury, the making of the note described in the complaint was admitted. It was a joint and several note signed by all the defendants, dated in 1846, and due in May, 1847, for $500 and interest. The interest was paid and indorsed upon it in 1847 and 1848. In 1848, on the 5th day of August, the defendants

Taylor and Flagler, having become insolvent, made an assignment for the benefit of their credtors, to Edward Wells and Gilbert B. Hart. To this assignment were annexed schedules of the debts which the assignees were directed to pay, and among others this note was specified in one of the schedules. The assignees, accordingly, having converted some or all of the property of the assignors into money, made a dividend of fifty per cent on the class of debts to which this note belonged, and on the 23d of August, 1849, Mr. Wells paid the plaintiffs two hundred and fifty dollars on the note in question. Upon this payment the plaintiff relies to take the case out of the statute of limitations; and thus the case presents distinctly the question whether a payment by the assignees of an insolvent debtor under an assignment specifying the debt in question and directing its payment, made within six years after the debt became due, and within six years before suit brought, is a bar to the suit. Of course, so far as the defendant Durvin is concerned, upon the authority of *Shoemaker* v. *Benedict*, (1 *Kern.* 176,) no act or admission of the other defendants, or in their behalf, can revive the debt. But as to Taylor and Flagler, the question is a different one.

I can find no case in the courts of this country in point. In *Roosevelt* v. *Marks*, (6 *John. Ch. R.* 266,) there had been no payment by the assignees of Marks and his partner, upon the demand in question, and this fact is strongly insisted upon by Chancellor Kent. And although he uses strong language as to the injustice of considering a payment of a dividend by the assignees of a bankrupt, or by trustees, as equivalent to a new promise by the original debtor, yet it should not be overlooked that he is speaking more particularly of the effect of such payments upon a co-obligee of the bankrupt, and that he is also considering the case of assignees in bankruptcy, who are not the agents voluntarily made by the debtor, and have no special directions to pay any particular debts.

In *Hammon* v. *Huntley and others*, (4 *Cowen's R.* 493,) the remark was made, *obiter*, that an admission by one of two executors would take a debt out of the statute. This was dis-

approved in *The Cayuga Co. Bank* v. *Bennett*, (5 *Hill*, 240,) in an observation also *obiter*, by Judge Cowen. The question in both these cases arose as to the power of one executor to bind his associates and the estate by admissions. In the latter case Judge Cowen speaks of *Thompson* v. *Peters*, (12 *Wheat.* 565,) as deciding that all the personal representatives of an intestate could not prevent the statute of limitations from attaching to a debt, by their joint admissions. An examination of that case, however, will show that the case turned upon the question of the extent and character of the declarations of the administrator, and that it is not an authority for the proposition to which Judge Cowen says it was cited in the case in 7 *Conn. Rep.*

I think, moreover, that even if any of these cases could be regarded as authorities to show that an admission by an executor or administrator is not sufficient to revive a debt, they would still not be decisive of the present question. The ground of these decisions is that executors and administrators are appointed simply to distribute assets for the payment of admitted or established debts, and not with the object nór clothed with authority to create liabilities, and with no express agency to pay any specific debts.

There is no doubt that a payment made by a debtor, of a part of, or upon, his pre-existing debt, is an admission of its existence, and of an existing liability to pay it, and that from such a payment the law will imply a promise to pay the residue. Such a payment furnishes the most satisfactory evidence of such an existing liability, and its assumption. It is a deliberate act against the interest of the party, and not liable to misrepresentation by witnesses, like a mere verbal acknowledgment. In the recent revision of our statute of limitations, therefore, the effect of a partial payment has been left as it has always been regarded to be, equivalent to a written acknowledgment of the debt or an express promise to pay.

The real question in all cases of partial payments, when they are not made by the party sought to be charged, himself, is the question of the extent of the authority of the person by whom they were made. That was the question in *Van Keuren* v.

Parmelee, (2 *Comst. R.* 523,) where it was decided that one of two partners has no authority, after a dissolution of the partnership, to revive a debt against his associate, by a new promise either express or implied from a partial payment; that is, that the relation of partners did not in itself vest any continuing authority in one of the partners to bind the other, in any way, after the dissolution of the partnership. So in *Shoemaker* v. *Benedict*, (1 *Kern. Rep.* 176,) it was held that a joint contract to pay money does not create an agency in one of several joint debtors, to continue or revive a debt barred against all by the statute of limitations. Both these cases are decided upon the question of authority implied or to be implied from the relation of the parties. Neither of them touch the principle that a partial payment made by an agent who is duly authorized, either expressly or impliedly, to make it for another, will furnish evidence of a new promise to pay, and revive the debt against that person. The payment need not, in any case, be made with the intention of making an acknowledgment and reviving the debt thereby. It is necessarily an unequivocal acknowledgment of the debt, and the law then at once implies a new promise to pay. The object and the effect of the payment is a question of legal construction, not of actual intention to be ascertained by looking into the minds of the parties. And therefore, I apprehend, in a question of agency, the simple question is, whether the agent had authority to make the payment in question, not whether he was authorized or directed to make the payment for the express object of barring the statute or otherwise to revive the debt, or to make a new promise to pay it. That may not have been in contemplation of the parties at all, but that will be the legal consequence and result of the payment, if the person making it had proper authority to make it as a payment on account of a debt of the party to be charged.

I think these considerations are decisive of the present case. Here the defendants Taylor and Flagler, within six years before this suit was brought, and before this suit was barred as to them by the statute of limitations, conveyed their property to trustees and directed them to pay this note among others, nam

ing and describing it, to pay it in full if their property was sufficient, if otherwise, to pay a ratable dividend upon it, with other debts. Is there any difference, in principle, between this authority and that conferred by an express written direction, by the debtors to an agent, to pay a particular amount upon a given debt? There could be no doubt that a payment by an agent, under such an authority and direction, would be equivalent to a payment by the debtor himself, and would afford incontrovertible evidence of liability and a new promise to pay. I can see no reason why the act of the assignees of these defendants, under all the circumstances of this case, should not be treated as an act of the defendants themselves, by an agent duly authorized for that purpose, and as evidence of a new promise by the debtor to pay this note.

There will, therefore, be judgment for the plaintiff, against the defendants Taylor and Flagler, for the amount remaining due on the note, and interest.

[WESTCHESTER SPECIAL TERM, March 3, 1856. *Emott*, Justice.]

22 72
16h 524

MORGAN *vs.* QUACKENBUSH and others.

An injunction can be granted only when it appears *by the complaint* that the plaintiff is entitled to the relief demanded. There must therefore be a complaint, upon which to found a motion for an injunction.

But if the motion is made upon an *affidavit* which contains all the requisites of a complaint, as prescribed in the 142d section of the code, that is sufficient.

On the 16th of January, 1855, the plaintiff was duly appointed chief of police of the city of Albany. A charter election for that city was held on the 2d Tuesday of April, 1856, for the election, among other officers, of a mayor, to hold his office for two years, to commence on the first Tuesday of May thereafter, at which P. and Q. were candidates for that office. At its next meeting after the election, viz. on the 14th and 15th days of April, the common council proceeded to canvass the inspectors' return of votes, and to determine and declare who was elected to the office of mayor; and they determined and declared, that P. had received the greatest number of votes, and was duly elected mayor, and made and filed a certificate of that determination. On the 6th

of May, when the term of office commenced, P. having taken and subscribed the oath, entered upon the discharge of the duties of the office. On the same day, the new common council proceeded to re-canvass the votes for mayor, and, upon such canvass it was determined and declared that Q. was duly elected mayor, and a certificate of that determination was made and filed. On the 12th of May the new common council appointed a large number of persons to be members of the police department, in the place of others whose term of office was about to expire. Among others W. was appointed policeman. The officers so appointed refused to take the oath of office before the mayor, as required by law. W. preferred charges against the plaintiff, as chief of police, to Q. as mayor, and Q., assuming to act as mayor, received and entertained the charges, and with the recorder and one of the aldermen of the city, was proceeding to hear the charges against the plaintiff. The grounds of the charges were that the plaintiff had refused to recognize as police officers the persons appointed by the new common council, until they should take the requisite oath of office before P. as mayor. On an application for an injunction to restrain Q. and the recorder and alderman, from hearing or trying the charges, or making any decision thereon, until the right of Q. to act as mayor should be determined;

Held 1. That the duty of the common council, in making the first canvass, was purely ministerial, and consisted in a simple matter of arithmetic; they not being at liberty to receive evidence of any thing outside of the returns of the inspectors. That in receiving affidavits tending to show fraudulent practices at the polls, and in omitting to canvass the votes of two election districts, on that ground, they acted illegally, and assumed to exercise a judicial power which the legislature had not vested in them. But that, having jurisdiction to make the canvass, their certificate entitled P. to the office until the error should be corrected by legal proceedings.

2. That the old common council having canvassed the returns, and declared the result, however illegally they might have acted, their power over the subject, as canvassers was spent, and the action of the new common council, in attempting to re-canvass the returns, on the 6th of May, and to determine and declare who was elected mayor, was unauthorized and void; they having no power to revise the action and correct the errors of their predecessors.

3. That the determination of the first board in favor of P. however erroneous it might be, had furnished him with *prima facie* evidence of his election; and that, having acted upon that evidence, qualified, and entered upon the discharge of the duties of the office, he became mayor *de facto*, and could not be displaced, except by an action brought for that purpose by some person claiming to be entitled to the office. And that P. being mayor *de facto*, Q. whatever his right, could not be mayor in fact at the same time, and did not derive even a *colorable* title to the office, from the determination of the second board of canvassers.

4. That the defendants were not authorized to proceed with the trial of the plaintiff upon the charges preferred against him, as chief of police, Q. having no

jurisdiction to receive charges against the plaintiff, or to officiate as a member of the tribunal organized for his trial.

5. That the new policemen had been duly appointed, and whether they had taken any oath or not they were entitled to act. That the plaintiff had no right to inquire whether, and before whom, they had taken their official oath, but should have recognized them, and organized the police; and that his refusal to do so was erroneous.

6. That the plaintiff having voluntarily thrust himself into the controversy, between the claimants for the office, he was not entitled to an injunction to restrain the proceedings of the defendants, however illegal.

MOTION for injunction. Upon the hearing of the motion, it was shown by affidavit on the part of the plaintiff, that on the 16th of January, 1855, the plaintiff was duly appointed chief of police in the police department of the city of Albany for the term of three years, and that he entered upon, and has ever since continued to discharge the duties of the office; that a charter election for said city was held on the second Tuesday of April, 1856, for the election among other officers, of a mayor, to hold his office for two years, to commence on the first Tuesday of May thereafter; that at such election Eli Perry and the defendant Quackenbush were candidates for such office; that the common council of the city, at its next meeting after the election, proceeded to canvass the inspectors' returns of votes, and to determine and declare who had been and was elected to the office of mayor; and that at such meeting, which was held on the 14th and 15th days of April, the common council did determine and declare, as the result of such election, that Eli Perry had received the greatest number of votes for the office of mayor, and was duly elected to that office; that a certificate of such determination was made by the common council, and signed by a majority of its members and filed with the city clerk; that the common council then adjourned to meet again on the 28th of April, at which time it met and transacted business, and again adjourned to the 5th of May, when it met and adjourned without day; that on the 6th of May, the day on which the term of office commenced, Mr. Perry, having taken and subscribed the oath prescribed, entered upon the discharge

of the duties of the office, and has ever since continued to discharge such duties.

It further appeared that on the 12th day of May, the new common council appointed a large number of persons to be members of the police department, in the place of others whose term of office was about to expire, and among others, John Wiley was appointed to the office of policeman; that the officers so appointed refused to take the oath of office before the mayor as required by law, and the plaintiff insists that, for this reason, they have not qualified themselves to enter upon and discharge the duties of the offices to which they have been appointed.

It was further shown that the defendant Quackenbush claimed that he was elected mayor and was entitled to discharge the duties of the office, and that John Wiley, who had been appointed policeman, had preferred charges against the plaintiff as chief of police, to the defendant Quackenbush as mayor, and that he, assuming to act as mayor, had received and entertained the charges, and with the other defendants, William S. Paddock and George B. Johnson, the recorder and one of the aldermen of the city, was proceeding to hear the charges against the plaintiff and inquire into the truth thereof; that the grounds of the charges preferred against the plaintiff were that he had refused to recognize as police officers the persons appointed by the new common council until they should take the requisite oath of office before Mr. Perry as mayor of the city.

Upon these facts the plaintiff asked that the defendant might be restrained by injunction from hearing or trying the charges preferred against him, or making any decision thereon, until the right of the defendant Quackenbush to act as mayor should be determined.

In opposition to the motion, it was shown that it appears from the inspectors' returns on file, that the whole number of votes received by the defendant Quackenbush for the office of mayor was 3332, and the whole number received by Mr. Perry was 3309; and that the new common council on the 6th of May proceeded to re-canvass the votes for mayor, and, upon such can-

vass it was determined and declared that the defendant Quackenbush, having received the greatest number of votes, was duly elected mayor, and they proceeded to make and file a certificate of such determination. It also appeared by the certificate of the first canvass, which was produced upon the hearing, that the number of votes allowed to the defendant Quackenbush, upon the canvass, was only 2172; and the number of votes allowed to Mr. Perry was 2990.

L. Tremain and *W. J. Hadley*, for the plaintiff.

A. J. Parker and *C. Cassidy*, for the defendant.

HARRIS, J. An objection was taken upon the hearing, which I was at first inclined to think fatal to this application. The action was commenced, as was stated, by the service of a summons, without complaint, and the motion is founded upon an affidavit. An injunction can only be granted when it appears *by the complaint* that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff. The objection is that there being *no complaint*, it cannot appear *by the complaint* that the plaintiff is entitled to the relief demanded. This is obviously so, but, on looking into the paper called *an affidavit*, I find that it contains all the requisites of a complaint. The ingredients of a complaint, as they are prescribed in the 142d section of the code, are all there. It contains the title of the cause; it specifies the name of the court, and the county where the plaintiff proposes to try the action, and the names of the parties. It then states the facts upon which the plaintiff relies to constitute his cause of action, and demands the relief to which the plaintiff supposes himself entitled. This makes a complaint. It is true, that instead of commencing in the form usually adopted in a complaint, it commences in form as a deposition. But, if the paper contains, as this does, every thing essential to constitute a complaint, the

form in which it is presented furnishes no sufficient ground of objection. I proceed, therefore, to the examination of the case upon the merits.

The inspectors of an election for charter and ward officers in the city of Albany are required, upon the completion of the canvass, to certify and declare the result, stating the number of votes given for each person for each respective office, and to file their statement and certificate in the office of the clerk of the common council within twenty-four hours. Their office is purely *ministerial.* They decide nothing. They merely declare the contents of the ballot-box. The next canvass is to be made by the common council. The statute declares that "at its meeting thereafter," the common council shall canvass *such returns*, and determine and declare the result. (*Sess. Laws of* 1851, *p.* 106, § 11.) The time of making this canvass is not fixed. The words "at its meeting thereafter" are entirely nugatory. It is probable that the legislature intended to declare, as it had been provided in previous statutes, that the canvass should take place at the first meeting of the common council after the election. But if so, the word "next" has been carelessly omitted in the sentence, and thus its effect is wholly destroyed. All that is now required is, that the common council shall canvass the returns and determine and declare the result. This, too, is a ministerial act. The common council are judges of nothing. They are not at liberty to receive evidence of any thing *outside* of the returns themselves. Their duty consists in a simple matter of *arithmetic.* They are to bring together the returns made by the inspectors of the several election districts, and ascertain, by computation, the aggregate number of votes given in the whole city for each person, for each office, and then declare the result by their certificate. If, in the first canvass, the common council received affidavits tending to show fraudulent practices at the polls, as it is well known they did, although the fact is not before me upon the motion, and, acting upon such evidence, omitted to canvass the votes of two election districts, they acted illegally. In doing so, they assumed to exercise a judicial power which the legislature has

never vested in them, *or any other board of canvassers.* All that appears upon that subject, on this motion, is, that while the returns of the inspectors show the aggregate number of votes for the defendant, Quackenbush, to be 3332, the canvass allows him but 2172; and while the aggregate number of votes for Mr. Perry, according to the returns, is 3309, the canvass allows him but 2990. But the common council did, on the 15th of April, assume the duty of canvassing the votes, and did determine and declare the result. Such determination was *prima facie* evidence that the person declared to be elected was entitled to the office. Assume that they transcended their authority, as they undoubtedly did, in rejecting a portion of the returns, could such illegal act justify the same body, when subsequently convened, in disregarding the first canvass altogether, and proceeding to canvass the votes anew? I think not.

When the returns of the inspectors had been canvassed and the result declared, however illegally the common council may have acted, their power over the subject as canvassers was spent. They had no right to re-convene themselves as a board of canvassers, and assume the duty of determining anew the result of the election. As well might the common council who may be in office on the first Tuesday of May, 1857, take it upon themselves to revise the proceedings of the 6th May, 1856, and declare some other person elected to the office of mayor. It was a re-canvassing of the returns, and this was a thing the legislature had not authorized them to do. It was an attempt of the new board to revise the action and correct the errors of their predecessors, and this is not among the powers with which they were clothed by the legislature. It seems to me very clear, therefore, that the action of the common council in attempting to re-canvass the votes for mayor on the 6th of May, and to determine and declare who was elected to that office, was entirely unauthorized and void. Both boards have erred, perhaps equally—the first, in going beyond the returns of the inspectors, and constituting itself a judge of the validity of the proceedings at the election; the second, in undertaking to correct the error of the first, by re-canvassing the votes.

The next inquiry relates to the effect of these proceedings upon the parties claiming the office. The first board did canvass the votes, illegally though it may be. They did determine and declare the result. That determination, however erroneously, has furnished to Mr. Perry *prima facie* evidence of his election. He had a right to act upon that evidence and take possession of the office. Having qualified and entered upon the discharge of its duties, he became mayor *de facto*. He cannot, in my judgment, be displaced except by an action brought in the manner prescribed by law for that purpose, by some other person claiming to be entitled to the office. The law on this subject is distinctly declared by the court of appeals in *The People* v. *Cook*, (4 *Seld.* 67.) The title to an elective office is derived from the people through the ballot-box. Somebody must declare what is the will of the electors, as thus expressed. Canvassers are provided for that purpose. The certificate of a board of canvassers is evidence of the person upon whom the office has been conferred. Upon all questions arising collaterally, or between the party holding the certificate and a stranger, it is *conclusive* evidence. But in a proceeding to try the right to the office, it is only *prima facie* evidence. In such a proceeding, now regarded as a civil action, it is competent for the court to go behind the adjudication of the canvassers. The whole question is thrown open, and extrinsic evidence is allowed to show what was the true state of the votes. In such an action, where the right to the office is the very thing in issue, the court will allow nothing to stand in the way between it and the ballot-box. It will put in requisition all the means within its reach to ascertain the expressed will of the electors, and will conform its judgment to such ascertained will.

Again; the common council having as a board of canvassers, declared Mr. Perry elected to the office, and their decision, however erroneous, remaining unreversed, what evidence has the defendant Quackenbush, however rightfully he may deem the office to belong to him, even of a *color* of right? Unless the returns of the inspectors can be successfully attacked, in

an action to try the right to the office, he must succeed in such an action. But if, as I have attempted to show, the re-canvassing of the returns by the new board furnished no more evidence of his right to the office than the certificate of any other equal number of respectable men, there is no determination upon which he can rely to give him even *the color* of right. Indeed, I do not understand that two persons *can be* in possession of the same office at the same time. If the certificate of the canvassers declaring Mr. Perry elected, vested him with *colorable* title to the office, as I think it did, so that he had a right to enter upon the discharge of its duties, another effect of that decision was, to exclude the defendant Quackenbush, as well as every body else, from the office.

They could not hold as tenants in common—each having a legal right to perform it functions. If Mr. Perry became mayor *de facto*, the defendant Quackenbush, whatever his right, could not be mayor in fact, at the same time. The attempt to effect this by the second canvass, tended to disorganization and has resulted in confusion. The city, in its municipal government, presents the unseemly deformity of a body with two heads, each head claiming to possess vitality and the right to control and regulate the functions of the body. This state of things, detrimental as it obviously is, to the interests of the community, is the immediate result of the unwarrantable attempt of the new board to correct, in a summary and illegal manner, the gross error of their predecessors. Had the controversy been promptly introduced before a legal tribunal, it is quite probable that, even before this time, a determination might have been bad, according to the very right of the case.

Unless I have entirely misapprehended the principles applicable to the case, it follows from what has already been said, that the defendants are not authorized to proceed with the trial of the plaintiff upon the charges preferred against him, as chief of police. The mayor alone is authorized to receive complaints against that officer. He is a necessary constituent in the tribunal to be organized for the trial. If, as I have endeavored to show, Mr. Perry is actually in possession of the office, and it cannot legal-

ly have two incumbents at the same time, Dr. Quackenbush has no jurisdiction to receive charges against the plaintiff, or to officiate as a member of the tribunal organized for his trial.

But because the proceedings of which the plaintiff complains are clearly illegal, it by no means follows that the plaintiff is entitled to an injunction to restrain those proceedings. In the view I have taken of this branch of the case, I have not deemed it important to inquire as to the power of the court to award an injunction. Conceding the power, I am satisfied that this is not a proper case for its exercise.

The policemen appointed by the new board presented themselves to the plaintiff for duty, with the legal evidence of their appointment. They had, in fact, been duly appointed, and whether they had taken any oath or not, they were entitled to act. The plaintiff stepped widely aside from his duty, when he permitted himself to inquire whether and before whom these officers had taken the oath required by the constitution. It constituted no part of his official duty. It was enough for him to know that they came to him bearing the warrant of their appointment by the proper authority. To refuse to recognize them, and organize the police, was an act mischievous and revolutionary in its character, and in no condition of things to be justified or upheld. The plaintiff seems voluntarily to have thrust himself into the controversy between the claimants for the office. Under such circumstances, he ought not to expect the extraordinary interposition of the court to protect him from apprehended injury.

I have thus discussed the various questions presented by the counsel for the parties upon the argument of this motion. I have stated honestly and frankly the convictions of my own judgment. For both the gentlemen claiming the office, I entertain high respect. Both are well qualified to discharge efficiently its duties. The welfare of the city demands that this unprofitable, and I think I may safely add, discreditable controversy should be speedily terminated. I shall be happy indeed if, in any way, this discussion shall tend to that result.

The motion for an injunction must be denied.

[Rensselaer Special Term, June 2, 1856. *Harris*, Justice.]

WEYBURN *vs.* WHITE.

22 82
26 639

The right of action to recover back money paid in pursuance of a bet or wager upon a horse race, depends wholly upon the statute, (1 *R. S.* 662, § 9;) no remedy being allowed by the common law.

And the statute limits the right of action to the person who shall pay, deliver or deposit any money, property or thing in action. He cannot assign or transfer such right to an assignee, so as to enable the latter to sue thereon.

MOTION by the defendant for a new trial. The action was brought by the plaintiff as assignee of Louis Barron, to recover the sum of $150, alleged to have been won by the defendant, from Barron, on a bet or wager upon a horse race at Saratoga Springs, in September, 1853. The money was deposited by Barron with a stakeholder, who paid the same to the defendant. The cause was tried at the Monroe circuit in October, 1855, by Mr. Justice JOHNSON. The defendant moved for a nonsuit on the ground that the demand was not assignable, so as to enable the assignee to maintain the action. The judge refused a nonsuit, and directed a verdict for the plaintiff, for $150 *and interest.* The defendant excepted to the ruling as to interest, and to the refusal to nonsuit; and the judge ordered the exceptions to be heard at the general term.

Benedict & Martindale, for the plaintiff.

S. Mathews, for the defendant.

By the Court, T. R. STRONG, J. The revised statutes relating to betting and gaming, (*vol.* 1, *p.* 667, § 8,) declare all wagers, bets or stakes made to depend upon any race, unlawful; and all contracts for or on account of any money or property, or thing in action so wagered, bet or staked, void; and by section nine it is provided that "any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet herein prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered," &c. The right of action to recover back money

pard in pursuance of such a wager or bet depends wholly on this latter provision; no remedy being allowed by the common law. And the statute being the sole basis of the right to sue, the person specified in it, and to whom the authority is expressly given, alone can maintain the action. It is the person who shall "pay, deliver or deposit any money, property or thing in action," who is in terms authorized to sue, and to him is the authority confined. The liability of the winner, or person to whom the money or property shall be paid or delivered, to an action at the suit of the person paying, delivering or depositing the money or property, is in the nature of a penalty or forfeiture for the benefit of the party aggrieved; and the party aggrieved, only, can enforce it, and in his own name. The right of action will not on his death pass to his personal representatives, nor can he transfer the same to an assignee. (*See Dudley* v. *Mayhew*, 3 *Comst.* 9, 15; *Fowler* v. *Van Surdam*, 1 *Denio*, 557; *Bevins* v. *Reed*, 2 *Sandf. S. C. Rep.* 436.)

The present action cannot therefore be maintained in the name of the plaintiff; and a new trial must be granted, with costs to abide the event.

CAYUGA GENERAL TERM, June 2, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

WHITBECK, executor, &c. and others *vs.* PATTERSON.

23 83
45 93
7h 609
40h 235

An application was made, to the surrogate, by W. executor, and others legatees of W. P., to prove his will. O. P. contested its validity, and the surrogate refused to admit it to probate. The applicants appealed to the supreme court, and that court reversed the decision of the surrogate, directed the will to be admitted to probate, and ordered the costs of O. P. to be paid out of the estate. These costs were paid. Subsequently O. P. appealed from the decision of the supreme court to the court of appeals. That court reversed the decision of the supreme court, and awarded a new trial, *with costs to abide the event.* The supreme court directed an issue to be formed, for the trial of the question of fact in reference to the proof of the will. A trial was accordingly had, before a jury, and the decision was in favor of the validity of the will. This decision being

certified to the surrogate, the will was admitted to probate. The executor and legatees then applied to the supreme court for costs of the appeals, and of the feigned issue; and for an order that O. P. repay the sum paid him for costs, in pursuance of the order of the supreme court which was reversed. *Held* that the supreme court had not lost its control over the case, but that it still had the power to impose upon the contestant the payment of the costs of the feigned issue. He was accordingly directed to pay those costs, and to refund to the executor the costs of the appeal to this court from the surrogate, which had been paid by the executor.

But it was *further held*, that this court had no control over the costs in the court of appeals, or power to direct the payment thereof by the contestant.

AN application was made to the surrogate by Whitbeck, executor, and others, legatees, to prove the will of William Patterson. Orrin Patterson, the respondent, contested its validity, and the surrogate refused to admit it to probate. The applicants appealed to the supreme court, and that court reversed the decision of the surrogate, directed the will to be admitted to probate, and ordered the costs of the contestant to be paid out of the estate. *These costs were paid.* Subsequently the contestants appealed from the decision of the supreme court to the court of appeals. That court reversed the decision of the supreme court, and awarded *a new trial, with costs to abide the event.* The supreme court ordered the questions of fact in reference to the proof of the will, to be tried at the circuit by a jury, on an issue formed for the purpose. A trial was had, and the decision was in favor of the validity of the will. This decision, upon the request of the applicants, was certified to the surrogate and the will was admitted to probate. The executor and legatees now applied for costs of the appeals, and of the feigned issue; and that Patterson repay the sum paid him for costs, in pursuance of the order of the supreme court which was reversed.

H. R. Selden, for the appellants.

O. Hastings, contra.

By the Court, T. R. STRONG, J. The revised statutes provided for appeals to the circuit judge of the circuit, from decisions of surrogates, either admitting, or refusing to admit, a will to record or probate, and prescribed the powers and duties of the circuit judge on the appeals. (2 *R. S.* 66, §§ 55 *to* 62 *inclusive*, 608; §§ 90 *to* 99 *inclusive*.) Provision was also made by them for an appeal to the court of chancery, from the decision of the circuit judge in certain cases. (*Ib.* 609, § 100.) The powers of the circuit judge in respect to awarding costs, were particularly defined, and did not extend to all cases; but the court of chancery, on the case being brought into that court, possessed the same general powers over the subject of costs as in cases generally in that court; upon a determination of it on the merits, the costs were to be paid by such party as the court should direct. (*Ib.* 613, § 2.) By the present judicial system, neither the office of circuit judge nor the court of chancery has existence, and appeals from decisions admitting or refusing to admit wills to record or probate, are to be to this court. (*Const. Art.* 6, *Laws of* 1847, *p.* 324, § 17.) And by the section last cited, all laws respecting appeals are made applicable to such cases, so far as they can be applied, and are consistent with the constitution and the judiciary act. The counsel for the contestant insists, that this court takes the place of the circuit judge upon such appeals, with the like powers only; that the circuit judge had not authority to impose costs on the contestant, in cases like the present; and therefore this court has not power to charge him with the costs. This position, I am satisfied, is materially erroneous. This court not only takes the place of the circuit judge, but also that of the court of chancery, in respect to such appeals. It has all the powers of the circuit judge in such cases, and also all the powers of the court of chancery on appeal from that officer. There is no express restriction of the court to narrower limits, and no manifestation of an intention to curtail the remedy, or the authority of the court, on appeals. The only substantial change which has been made, or was intended, is in regard to the tribunal to which the appeals are to be made, and by which the powers of the former

tribunals are to be exercised. The appeals are to be directly to this court; all laws applicable are to be deemed to apply; and this clothes the court with all the powers of the court of chancery on appeal to that court. (*Watts* v. *Aikin and others*, 4 *How. Prac. R.* 439. *Mead* v. *Mead*, 11 *Barb.* 661.)

I do not perceive why § 35 of *p.* 618, of the 2 *R. S.* is not also applicable to this case. That section provides, among other things, that upon appeals from surrogates' courts to the court of chancery, costs shall be paid by the appellant or respondent, as shall be directed by the latter court. It is one of the laws respecting appeals from surrogates, and with the others is applied to this court by § 17 above referred to, of the judiciary act. The case appears to me to be clearly within that provision.

This court has not, in my opinion, lost its control over the case. Strictly, after the trial of the issue, an application should have been made to the court, for the appropriate order and direction to the surrogate, embracing the subject of costs, and a certified copy of the proceedings and order sent to the surrogate. If that course had been pursued, the court would not be divested of its power over the case; the case would be still in this court; but it might form a ground of objection to the exercise of its power in granting the relief now sought. But application has not been made to the court for an order in the matter, until now; it is highly proper that the contestant should be charged with costs; and no good reason appears, I think, why the court should not now impose on him the payment of them.

With the costs in the court of appeals, however, this court has nothing to do. It belonged exclusively to that court to direct in regard to them, and it has made no direction, thereby leaving each party to pay his own costs in that court. The only direction given was, that this court award a new trial, with costs to abide the event. This does not embrace costs in the court of appeals, over which this court has no power.

The conclusion arrived at being in accordance with the direction of the court of appeals, the validity and effect of that direction need not be considered.

It is conceded that the costs of the contestant, on the appeal

to this court, were paid by the executor, in pursuance of the judgment of this court, before the reversal of that portion of it relating to the costs, and it is proper the amount paid should be refunded. There does not appear to be any good reason why restitution should not now be awarded. (*Safford* v. *Stevens*, 2 *Wend.* 164, 165.)

An order for the payment of costs, and for restitution, in accordance with this opinion, is therefore granted, to be settled by one of the justices of this court, on notice.

[Cayuga General Term, June 2, 1856. *T. R. Strong*, *Welles* and *Smith* Justices.]

Potter *vs.* Thompson and wife.

In an action for slander, the time of the uttering of the slander as alleged in the complaint may be departed from, in evidence. A variance between the complaint and proof, in that respect, is wholly immaterial.

Where, in an action against husband and wife, for slander uttered by the wife, in charging the plaintiff with theft, the evidence did not show that the wife was influenced by a desire to do the plaintiff an injury; and she manifestly entertained no actual ill will or unkind feelings towards him, and merely expressed her own convictions; circumstances were proved which were calculated to excite suspicions of the plaintiff; and it was proved that the plaintiff himself had said, in view of the circumstances, that he did not blame her, and he acknowledged her kindness in first speaking to him on the subject; *it was held* that this was a case for moderate damages; and the jury having found a verdict in favor of the plaintiff, for $600, a new trial was ordered, unless the plaintiff would stipulate to reduce the amount to $200.

MOTION by the defendants for a new trial, upon a case. The action was against husband and wife, for slander uttered by the wife. The complaint alleged that some time about the month of September, 1853, at &c., a watch was stolen from the premises of the defendant Lovel Thomson; that Maria Thompson, the wife of the said Lovel, did, "on or about the month of November, 1853," utter the words specified, intending to convey the idea that the plaintiff had been guilty of larceny, ir

stealing the said watch. The second count alleged the uttering of other words "sometime during the month of December or thereabouts in the said year 1853." The answer admitted that a watch was stolen from the defendant Lovel Thompson in September, 1853; that the defendant Maria Thompson, in speaking of and concerning the plaintiff, and the stealing of the said watch, uttered a portion of the words mentioned in the complaint, and alleged that they were true, and were not spoken maliciously, or with a view to injure the plaintiff. On the trial the speaking of a part of the words was proved. A witness being questioned as to a conversation between her and the defendant Maria Thompson, which occurred in June, 1854, the defendant's counsel objected to the testimony, on the ground that none of the words mentioned in the complaint were alleged to have been spoken subsequently to the year 1853, and that consequently words spoken after that year could not be given in evidence. The court overruled the objection, and received the evidence. Wilson Devine testified as follows: "I reside in the town of Venice. I know these parties. I live from three to four miles from Thompson's, and about seven or eight miles from Potter's. Mr. Potter came to my house the latter part of last summer to inquire about this matter: he came to my house and wanted to know if my wife recollected what conversation took place between her and her sister some time before. She stated it over and he said it was correct, and then said Thompson's folks won't find the watch now, as their suspicions are so strong of me that they won't think of looking any where else for it; do not know as he inquired what we had heard from Thompson's folks." The other material facts proved appear in the opinion of the court. The court charged and instructed the jury as follows: That if they should find from the evidence that any of the actionable words laid in the complaint had been proved, the charge was slanderous, and the plaintiff had made out a cause of action and was entitled to their verdict. That when actionable words were proved the law presumed a degree of malice sufficient to sustain the action. That it was a question wholly for the jury to say what amount of damages the plaintiff had

sustained, and how much he had been injured by the speaking of the slanderous words, if they should find they had been spoken. That it was not a case where the jury would be likely to feel called upon to give much beyond actual damages by way of punishment to the defendants. The counsel for the defendants requested the court to charge the jury that unless they should find from the evidence that the words charged were uttered by Mrs. Thompson, on or before the time in that respect laid in the complaint, then the plaintiff could not recover, which said court refused to do, and to that refusal the counsel for the defendants excepted. The jury rendered a verdict in favor of the plaintiff for the sum of $600.

N. T. Stephens, for the plaintiffs.

Wright & Pomeroy, for the defendants.

By the Court, T. R. Strong, J. There is abundant evidence of the speaking, by the defendant, of a portion of the words as laid in the complaint, and under such circumstances, and in such connection, as thereby to impute, and to convey to the minds of the hearers, that the plaintiff had committed the crime of larceny. It was objected at the trial, and that objection is urged here, that this evidence does not sustain the complaint, inasmuch as it relates to periods several months subsequent to the times of speaking the words stated in the complaint; but there is no force in the objection. The time of the uttering of the slander as alleged in the complaint, might be departed from in evidence, and a variance between the complaint and proof, in that respect, is wholly immaterial. A cause of action was therefore established entitling the plaintiff to damages.

But the amount of damages allowed by the jury is, I think, greatly beyond what the case warranted, and so excessive as to evince that the excitement of the trial, or some other cause, has misled the jury and prevented them from being governed in regard to the damages by their deliberate judgment. The slander was uttered by a married woman, whose husband is sued with her, and he must share with his wife the consequences of the

slander, which should impose a narrower limit to the measure of damages so far as they are exemplary; the evidence does not show that the wife was influenced in speaking of the plaintiff by a desire to do him an injury; she manifestly entertained no actual ill will or unkind feelings towards him; what she stated was the simple expression of her own convictions; circumstances were proved which were calculated to excite suspicions of the plaintiff; and it was proved that the plaintiff himself, on one occasion, in view of the circumstances, stated that he did not blame her, and acknowledged her kindness in first speaking to him on the subject. In addition, the declarations of the plaintiff in regard to the mode in which he obtained a watch in New York; his consultation with the "spirits;" his remark that he did not blame persons for thinking he had committed the theft; and the testimony of the witness Devine; and other circumstances, all go to mark this case as one for moderate damages; and so it appears to have been regarded by the learned justice at the trial, as is evident from the remark made by him in his charge, "that it was not a case where the jury would be likely to feel called upon to give much beyond actual damages by way of punishment to the defendants."

It is only in special and rare cases that the court will grant a new trial in an action for slander because the damages allowed are excessive; where the amount is so large as to be clearly and grossly unjust, and to make it apparent that it is the result of excitement and passion or some other influence than that of the law and the evidence. I am forced to the conclusion that this is such a case; that the verdict is for more than three times what it should have been, and that it is the duty of the court to set aside the verdict and allow a new trial, unless the plaintiff will reduce the verdict as hereinafter stated. (*Clapp* v. *Hudson River Rail Road Company*, 19 *Barb.* 461.)

A retrial is granted, on payment of costs, unless the plaintiff within twenty days stipulates to reduce the amount of the verdict to $200, in which case the motion for a new trial is denied.

[Cayuga General Term, June 2, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

Robertson *vs.* The New York and Erie Rail Road Company.

22 91
3h 333
29h 52
57a 390
57a 396

A rail road company, by its printed rules and regulations, prohibited its engineers from allowing any one, not in its employ, to ride upon the engines. The plaintiff applied to an engineer for permission to ride upon the engine, and was informed that it was against the rules of the company to carry him in that place, but the engineer finally consented that the plaintiff might ride with him, and he did so, without the knowledge of the conductor, and paying no fare. *Held*, that the consent of the engineer conferred no legal right, and that the plaintiff, not being lawfully upon the engine, was a wrongdoer, and could not recover damages of the company for an injury sustained while riding in that place.

Held, also, that the *onus* was on the plaintiff to show that the engineer had authority from the company to permit him to ride upon the engine; the presumption being that he had no right to be there, whether he paid fare or not.

THIS action was tried at a circuit court held by Mr. Justice Gray, in Broome county, in October, 1855. The plaintiff was nonsuited. He now moved for a new trial upon a case and exceptions. The facts sufficiently appear in the opinion of the court.

D. S. Dickinson, for the plaintiff, cited and commented upon the following cases: *Derby* v. *P. and R. R. R. Co.*, 1 *Am. Railway Cases*, 109 *and* 126. *Marshall* v. *York N. C. and B. R. R. Co.*, 7 *Eng. Law and Eq. R.* 523. *Carroll* v. *N. Y. and New Haven R. R. Co.*, 1 *Duer*, 571. *Penn. R. R. Co.* v. *McClosky*, 11 *Harris*, 526. 2 *Am. Railway Cases*, 114. 4 *Denio*, 370.

B. Davis Noxon, for the defendants, cited and commented upon the following cases: 3 *Barb.* 388. *Haring* v. *N. Y. and E. R. R. Co.*, 13 *Barb.* 9. 11 *East*, 60. *Munger* v. *Tonawanda R. R. Co.*, 4 *Comst.* 349. 12 *Pick.* 177. 2 *id.* 621. 5 *Barb.* 338. 6 *Hill*, 592. 10 *Metc.* 363. 11 *id.* 442. 21 *Pick.* 146. 4 *Comst.* 547. 1 *Bos. & Pul.* 382. 4 *John.* 376, 7. 14 *id.* 304.

By the Court, BALCOM, J. The plaintiff was badly injured by reason of the negligence or want of skill of the defendants, while riding upon an engine on the defendants' rail road, between the Susquehanna and Port Jervis stations, in January, 1855. The engine, at the time of the accident, was drawing the night express passenger train going east. The accident occurred at about four o'clock in the morning, by the engine running against some rocks that had fallen or slid from a ledge upon the track of the road. The plaintiff paid no fare, and the conductor of the train did not know he was upon the engine, prior to the accident. When the plaintiff applied to the engineer for permission to ride upon the engine he was told by him that it was against the defendants' rules to carry him in that place, but the engineer, notwithstanding this declaration, consented that the plaintiff might ride with him upon the engine. The printed rules and regulations of the defendants prohibited the engineer from allowing the plaintiff or others who were not their employees to ride upon the engine.

The question upon which the case turns is, whether the plaintiff was lawfully upon the engine at the time he was injured. If he was lawfully there, then he was improperly nonsuited; otherwise not. The plaintiff, without information on the subject from any of the defendants' agents or servants, had no right to presume that the engineer had authority from the defendants to permit him to ride upon the engine, especially as he paid no fare. The presumption was against his right to be upon the engine, whether he paid fare or rode free. The engine is not the place where even that class of passengers who pay no fare usually ride. The *onus* lay with the plaintiff to show that the engineer had authority from the defendants to permit him to ride in that place, but he showed no such thing; and the plaintiff had no more warrant for presuming that the engineer had authority from the defendants to allow him to ride upon the engine without paying fare, than he had for supposing the ticket agent at the place where he went aboard of the engine, had authority to take money from the defendants' safe and give him, to enable him to pay his fare to the place whither he was going

The ticket agent had precisely as much authority from the defendants to make the plaintiff a present of their money as the engineer had to give him a free ride upon the engine.

The plaintiff rode upon the engine with the presumption against his right to ride thereon; and not only with knowledge of the fact that the engineer had no authority from the defendants to permit him to be there, but when he was informed that the engineer was forbidden by the defendants' rules to permit passengers to ride in that place. The consent of the engineer, which the plaintiff knew was unauthorized by the defendants, conferred no legal right upon the plaintiff to ride upon the engine. His consent was not binding upon the defendants. It was utterly void, and is of no account in the case. It is therefore clear, that the plaintiff was not lawfully upon the engine at the time he was injured.

This case is unlike those cited by the plaintiff's counsel, where injured passengers have recovered damages, although, at the time they were hurt, they were not in the cars where passengers usually ride. In such cases the injured passengers were lawfully and rightfully upon the trains, and were only guilty of an impropriety in selecting the car or seats in which they rode; whereas, in this case, the plaintiff never was rightfully upon the train. He was a wrongdoer the moment he stepped his foot upon the engine, and so continued until he was injured, and cannot sustain this action.

The motion for a new trial is therefore denied with costs.

[Delaware General Term, July 6, 1856. *Shankland*, *Gray*, *Mason* and *Balcom*, Justices.]

BULL *vs.* COLTON.

In an action brought before a justice of the peace, the complaint alleged that the defendant made an assault upon the horse of the plaintiff, while said horse was attached to a buggy wagon, "*and while plaintiff was in said wagon*, by willfully and maliciously striking, whipping, beating and pounding said horse with a whip and hoe; and greatly injured, hurt and damaged said horse, and caused said horse to rear up, jump and run, *while said plaintiff was in said buggy wagon*, causing said horse to be greatly frightened, to plaintiff's damage $100." *Held* that the action was not one for an assault and battery, upon the complaint as put in; but that it was proper for the justice to permit the plaintiff to amend the complaint by striking out the allegations relative to the plaintiff's being in the wagon, at the time of the occurrence; and that after such amendment the action was clearly an action for injuring property; which the justice had jurisdiction to try.

APPEAL from the Madison county court. The action was brought before a justice of the peace, where the plaintiff complained of the defendant as follows: "That said defendant, on or about the 8th of June, 1824, with force and arms, to wit, at Lenox, made an assault upon the horse of said plaintiff, while said horse was attached to a buggy wagon of plaintiff, *and while plaintiff was in said wagon*, by willfully and maliciously striking, whipping, beating and pounding said horse with a whip and hoe; and greatly injured, hurt and damaged said horse, and caused said horse to rear up, jump and run, *while said plaintiff was in said buggy wagon*, causing said horse to be greatly frightened, to plaintiff's damage $100."

The defendant, for a defense, claimed that he was overseer of the highway in Lenox, where the transaction occurred, and that he was at work repairing such highway when the plaintiff came along with his horse and wagon; and that he stopped where the defendant was at work on the highway, and hindered him, and those under him, in their work; and that the whipping and beating of the horse by the defendant was for the purpose of causing the plaintiff to pass along, so that the defendant could proceed with his work.

The evidence showed that the plaintiff was riding in a wagon in the highway, and driving his horse, thereto attached, at the time the defendant whipped and beat the horse. The evidence

authorized the justice to find that such whipping and beating of the horse was not only unnecessary but willful and malicious. After the evidence was closed, the defendant objected to the jurisdiction of the justice, on the ground that the action was for an assault and battery; whereupon the justice permitted the plaintiff to strike from the complaint the allegations "and while plaintiff was in said wagon," and "while said plaintiff was in said buggy wagon." The defendant objected to the alteration of the complaint.

The justice gave judgment against the defendant for $25 damages besides costs; which judgment was affirmed by the Madison county court.

B. F. Chapman, for the respondent.

Thomas Barlow, for the appellant.

By the Court, Balcom, J. If the plaintiff had unnecessarily stopped with his horse and wagon in the highway, and there hindered the defendant or the men under him, while repairing such highway, the defendant, as overseer of such highway, would have been justified in using all necessary and proper force to remove the plaintiff from the place where the defendant was at work, if the plaintiff had neglected or refused to pass along, after being requested to do so by the defendant. But this point is disposed of by the finding of the justice upon the evidence.

If this action is brought for an assault and battery upon the plaintiff, the justice had not jurisdiction of it. (*Code*, § 54, *sub.* 3.) Is it such an action? There can be no doubt but that the plaintiff could have sustained an action in the supreme court for an assault upon his person and recovered damages therefor and for the injury to his horse. (*De Marenville* v. *Oliver*, 1 *Penn. N. J. Rep.* 380. 1 *Dall.* 114. *Barb. Cr Tr.* 212. *People* v. *Lee*, 1 *Wheel. Cr. Cas.* 364. 4 *Denio*, 453. *Whart. Am. Cr. Law*, 462.) Such causes of action may be united in the same complaint. (*Code*, § 167, *sub.* 2, 3.) But

the plaintiff had the right to waive all damages for the assault upon his person and bring his action solely for the injury to his horse His person was not touched, and the damages to his horse were easily separated from any for the supposed assault upon his person. He had his choice between two remedies, and has elected which action he would bring, and such election did not prejudice the defendant. He has lost no right by reason thereof. The recovery in this case is a bar to any other action the plaintiff may institute, for damages arising out of the same transaction. If the plaintiff has not recovered his entire damages in this action he must lose whatever he has failed to recover, for the reason that he has elected what remedy he would pursue, and has split his demand, and must be content with the portion he has got. He cannot sustain another action for the residue. (*See Farrington* v. *Payne*, 15 *John.* 431; *Rice* v. *King*, 7 *id.* 20.)

The justice did right in permitting the plaintiff to divest his complaint of the allegations in it which he supposed might characterize the action as one for an assault and battery. The pleadings in a court held by a justice of the peace may always be amended, when by the amendment substantial justice will be promoted. (*Code*, § 64, *sub.* 11.) The action, as it stands upon the amended complaint, is clearly one for "injuring property." (*Code*, § 53, *sub.* 2.) Nor is the action one for an assault and battery, when judged by the complaint before it was amended.

The judgment of the county court was right, and it should be affirmed with costs.

Judgment accordingly.

[Delaware General Term, July 16, 1856. *Shankland*, *Gray*, *Mason* and *Balcom*, Justices.]

CALKINS *vs.* LONG.

22 97
66 272
1L 124
14h 207
17h 331
38h 31
40a 421
107a 679
116a 642
118a 12

At common law, a mortgage, being under seal, imported a consideration, and proof of a failure, or want, of consideration was not admissible to impeach it.

This rule of the common law has not been so far altered by the statute allowing a party bound by an instrument under seal to set up a want of consideration at law, (2 *R. S.* 406, § 77,) as to enable a mortgagor to apply to a court of equity to cancel the mortgage, upon the ground of a want, or a failure, of consideration.

The language of the statute seems to confine the change or modification of the common law to cases where an action is brought upon the instrument itself, or where the instrument is made the foundation of a set-off.

A trust created by a husband, for the support and maintenance of his wife who has left him in consequence of alleged ill treatment, and is living separate and apart from him, is a valid trust, and will uphold a mortgage given by the husband, to a trustee, to secure the payment of a specified sum annually for the wife's support.

Where such a mortgage is given by a husband, after a separation has taken place for alleged ill usage of the wife by the husband, and upon a claim of the wife, that she is entitled to have provision made for her maintenance, in consequence of such ill usage, the presumption is very strong that there were grounds upon which to found such a claim. The very fact of reluctantly giving a mortgage, under such circumstances, affords a strong presumption that there was a good consideration to uphold it, found in the ill treatment of the wife and her consequent claim for separate maintenance.

C. had lived on unpleasant terms with M. his wife, and she had quit him, in consequence of alleged ill treatment, and refused longer to live with him. C., in order to secure to his wife a separate maintenance, gave to L. a mortgage for $1700, conditioned to pay the latter $100 annually, so long as M. should remain the wife or widow of C.; and if default should be made in the payment of the said $100 annually, then and in that case the said sum of $1700 should be collected of the mortgagor by a sale of the mortgaged premises; and for that purpose a power of sale was contained in the mortgage. *Held* that such mortgage was not void upon grounds of public policy as interfering injuriously with the conjugal relations; and a complaint, filed by C., the mortgagor, praying that the mortgage might be given up and canceled, or that L. should cancel the same, and be prohibited from collecting it, was dismissed.

Where husband and wife agree to separate, a stipulation on the part of the husband to pay a specified sum annually, for the separate maintenance and support of the wife, is valid, and may be enforced.

If the separation be intended to be only temporary, then, if the husband offer to take back his wife, and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to

the wife. But if the separation be intended to be permanent, that is, during life, then the offer of the husband to cohabit with his wife does not put an end to the contract for separate maintenance.

IN this case the plaintiff had lived on unpleasant terms with his wife, who is the sister of the defendant, and his wife had quit him in consequence of alleged ill treatment, and refused longer to live with the plaintiff. The plaintiff, in order to secure to her a separate maintenance, gave and executed to the defendant a mortgage for $1700 upon his lands in Chenango county, conditioned to pay the defendant $100 annually, so long as Martha, the plaintiff's wife, should remain the wife or widow of the plaintiff; and if default should be made in the payment of the said $100 annually, then and in that case the said sum of $1700 should be collected of the plaintiff by a sale of the mortgaged premises; and for that purpose a power of sale was contained in the mortgage. The condition of the mortgage was to pay the defendant $100 annually, so long as Martha, the plaintiff's wife, should remain the wife or widow of the plaintiff. There was nothing in the mortgage to show that the money was to be paid to the defendant for the use of the plaintiff's wife, or for her benefit. There was talk at the time of the giving of the mortgage, that the defendant should execute back to the plaintiff a writing agreeing to apply the $100 annually to the support of the plaintiff's wife Martha, but it was understood by the parties that the defendant's verbal agreement thus to apply the moneys was just as good, and by consent of parties this writing was waived, the plaintiff being willing to rely upon the defendant's verbal promise thus to apply the money; and upon these conditions the plaintiff executed the mortgage in question to the defendant. This suit was commenced by the plaintiff to procure the judgment of this court that the mortgage be given up to the plaintiff and be canceled, or that the defendant cancel the same, and be prohibited from collecting it. The plaintiff claimed and insisted that the mortgage could not be enforced; that there was no valid consideration to uphold it; secondly, that as this mortgage was based on a voluntary separation of husband and wife,

and contemplated a continuance of that separation, and stood as a formidable obstacle in the way of a restitution of the conjugal rights of the plaintiff and his wife, the same was void upon grounds of public policy, as calculated to interfere improperly and injuriously with the marital relations.

J. Benedict, for the plaintiff.

B. F. Rexford, for the defendant.

MASON, J. As to the first point, it should be borne in mind that the mortgage, being under seal, imports a consideration. (*Chitty on Cont.* 28, 7*th Am. ed.* 2 *Kent's Com.* 464, 6*th Am. ed.* 2 *Black. Com.* 446. *Parker* v. *Parmele*, 20 *John.* 130.) This mortgage, therefore, is founded upon a good and sufficient consideration, implied by the common law from the act of sealing and executing, and a mere failure or want of consideration was not admissible to impeach a sealed instrument, at common law. (*Parker* v. *Parmele*, 20 *John.* 130, 134, *and cases above cited.*) Chief Justice Spencer said, in the case of *Parker* v. *Parmele*, "It is not for me to question the wisdom of the common law in denying to a party, who has entered into an agreement under his hand and seal, a right to impeach it on the ground of a want of consideration. It is sufficient that the law is so."

The question arises, then, has the common law been so far altered by our statute as to enable a mortgagor of real estate to apply to a court of equity to cancel the mortgage, upon the ground of a want, or a failure, of consideration. The statute is as follows: "In every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed." (2 *R. S.* 406, § 77.) The language of this statute would seem to confine the change or modification of the common law to cases where there is an action brought upon the instrument itself, or

where the instrument is made the foundation of a set-off; and if the court were right in giving the statute this limited construction in the case of *Gilleland, executor*, v. *Failing*, (5 *Denio*, 308,) then it does not lie with the plaintiff to say in this suit that the mortgage in question is without any consideration to support it. It is not necessary, however, to place the decision of this case upon that ground, for I am of opinion that there is a sufficient consideration to uphold the mortgage upon the facts established by the evidence in the case, if there is a valid trust created by this mortgage for the benefit of the wife. The husband is bound to support his wife; and the relation of husband and wife is *ipso facto* a letter of credit to the wife for necessaries suitable and proper to the sphere in which she moves; and it is well settled that if the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries. And the general reputation of the separation will be sufficient to protect the husband. (*Baker* v. *Barney*, 8 *John.* 73. *Fenner* v. *Lewis*, 10 *id.* 44. *Todd* v. *Stokes*, 2 *Salk.* 116. 4 *B.* & *A.* 252.) If, however, they separate without any provision being made for her maintenance, the husband is liable for necessaries furnished her, suitable to his condition in life. (*Lockwood* v. *Thomas*, 12 *John.* 248.) For aught this court can know, the husband may have deemed it to his pecuniary advantage to have the defendant receive $100 a year from him and apply it to the separate support and maintenance of his wife. The living separate is not the consideration for the paying the $100 a year for the support of the wife. The consideration is founded on the conjugal relation and the discharge of liability which the law attaches to such a provision. Take the case under consideration. Suppose it is conceded that this is a valid mortgage and creates a valid trust by which the plaintiff is bound to pay $100 per year for the support of his wife, and that that sum shall be adjudged a proper sum for her separate maintenance, suitable to the condition and circumstances in life of the plaintiff; then the

plaintiff is released from all liability which the common law would otherwise attach to him, for necessaries furnished by others. So it will be seen that indemnity against the debts of the wife's contracting is found in the law itself, which follows as a consequence of separation and a suitable provision for separate maintenance, and which is as ample an indemnity as any bond of the trustee could be. I think that no one can doubt, in this case, that $100 a year, considering the limited means of the plaintiff, is all that a court of equity would adjudge as reasonable for a separate maintenance of the wife. There can be no doubt that this is a valid trust for the benefit of the wife. The case does not encounter even the limited difficulty imposed by the 64th section of our statute of uses and trusts. (1 *R. S.* 730, § 64.) And the 66th section of the same statute affords most ample protection to the husband against any misapplication of these moneys by the trustee. The statute is as follows: "No person who shall actually and in good faith pay a sum of money to a trustee which the trustee is authorized to receive, shall be responsible for the proper application of such money according to the trust. Nor shall any right or title derived by him from such trustee, in consideration of such payment, be impeached or called in question in consequence of any misapplication by the trustee, of the moneys paid." (1 *R. S.* 730, § 66.) Now if the husband has made a reasonable provision for the wife's separate maintenance, and that too after they had actually separated, then the husband is released from all liability for debts contracted by the wife after such separation, even though the trustee squander the moneys, or misapply them. (*Baker* v. *Barney*, 8 *John.* 73. 1 *R. S.* 730, § 66.) But again, this covenant being under seal, implies a consideration, and is therefore *prima facia* good. The burden of proving a want of consideration lies on those who assert it. Now it cannot be doubted for a moment, upon the evidence in this case, that the mortgage was given to provide a separate maintenance to the wife, and that such security for a separate maintenance was demanded after she had quit the plaintiff and refused longer to live with

him, in consequence of alleged ill treatment. And that this was made the ground of a distinct claim against the plaintiff by the defendant, who is the brother of the plaintiff's wife, and that threats of instituting coercive measures against the plaintiff to secure provision for her support were made by the defendant, unless the plaintiff would execute some instrument securing to her a reasonable support. In the case of *Clough* v. *Lambert*, (10 *Simons*, 174 ; 16 *Eng. Ch. Rep.* 175,) the deed recited that divers unhappy difficulties had subsisted, and did still subsist, between the husband and wife, and there was no evidence to show any acts of abuse of the wife that would in any manner justify a separation, and still the court upheld the deed; and they distinctly declare that the deed being under seal is *prima facie* good, and that the onus of impeachment lies on those who seek to avoid it. The court say, "for any thing that appears to the contrary, there may have been circumstances alluded to, under that recital, which would have justified the wife in applying to the ecclesiastical court for a divorce *a mensa et thoro*." So, in the case under consideration, the mortgage having been given after separation for alleged ill usage, and upon a claim of the wife, persisted in, that she was entitled to have provision made for her maintenance, in consequence of ill usage, the presumption becomes very strong that there were grounds upon which to found such a claim. The very fact of reluctantly giving this mortgage, under such circumstances, affords a strong presumption that there was a good consideration to uphold it, found in the ill treatment, and her consequent claim for separate maintenance.

The question arises then, does the evidence in this case overcome such presumption? I do not think it does. The evidence, in my opinion, is sufficient to justify a decree for separate maintenance, were not most of the acts of ill treatment pardoned by the forgiveness of the wife by her return to live with the plaintiff. But perhaps we should not be justified in finding that these subsequent acts of ill treatment are sufficient to revive the former acts of abuse, were not this view of the case aided by the presumption which is to be drawn from the

fact that the wife in this case had quit the plaintiff for alleged ill treatment and abuse, and refused longer to live with him, on that account, and demanded that some provision be made for her separate support, and that this mortgage was given in compliance with such demand. A condonation is a conditional forgiveness. It implies that the party will not put forth the bad conduct which is forgiven, if the husband shall continue ever afterward to treat her with conjugal kindness; and a subsequent repetition of the personal abuse affords not a substantial cause of separation, but revives all those which existed prior to the condonation. (*Burr* v. *Burr*, 10 *Paige*, 20. *De Aguilar* v. *De Aguilar*, 1 *Hagg.* 733. *Beebee* v. *Beebee*, 1 *id.* 789.) And slight acts of abuse, and which of themselves would not sustain the bill, are a breach of this conditional reconciliation, and revive all antecedent acts of cruelty and misconduct. (10 *Paige*, 24.)

I propose to consider, in the second place, whether the mortgage in question is void upon grounds of public policy, for the reason that it interferes injuriously with the conjugal relations. I know that Lord Eldon and some of the most learned of the judges of Westminster Hall have thrown doubt upon the question, whether all agreements based on articles of separation between husband and wife ought not to be held as absolutely void, for the reason above stated. (*Lord St. John* v. *Lady St. John*, 11 *Ves.* 526.) And some of the judges in this state have declared similar sentiments. (*Beach* v. *Beach*, 2 *Hill*, 260, 264. *Mercein* v. *The People*, 25 *Wend.* 64, 77. *Carson* v. *Murray*, 3 *Paige*, 483, 500.) The law, however, has been too long settled, both in the courts of law and equity, in England and in this country, that a valid agreement for immediate separation between a husband and wife, and for a separate allowance for her support, may be made, through the medium of a trustee, to admit of a discussion of the soundness of the doctrine upon which the cases have proceeded. It was said by the learned Serj. Williams, in arguing the case of *Lord Radnor et al.* v. *Chambers*, (*reported in* 2 *East*, 283,) that such covenants have long been established by repeated de-

cisions in cases where separation has actually taken place, and that all the arguments which can be urged against the soundness of the doctrine have been overruled more than a century ago; and the court held in that case that a covenant by a husband to pay a certain annual sum by way of separate maintenance for his wife, in their future separation, with the consent of such trustees, is valid in law; and although Lord Eldon, two years afterward, criticised the case with great severity, (11 *Ves.* 537,) he did not presume to overrule the case. He says, "but if dicta had followed dicta, or decision had followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." And the court of king's bench, as late as 1824, in the case of *Jee* v. *Thurlow*, (2 *B. & C. R.* 547; 9 *Eng. Com. Law*, 174,) held a deed legal and binding which, after reciting that differences existed, and that the husband and wife had agreed to live separate during her natural life, made a provision for the wife's support, and sustained an action of debt by the trustee, for arrears of the annuity. The strong dissent of Lord Eldon in this case of *St. John* v. *St. John*, (11 *Ves.* 537,) to the doctrine of that case, has led to frequent attempts, both at law and in equity, to overthrow the judgment in *Radway* v. *Chambers*, and also to question the legality of any contract between husband and wife, even through the medium of a trustee, for a separation of any kind, whether present or future. Those attempts were made in equity successively, before Sir William Grant, Sir Thomas Plumer, Sir John Leach, and before Lord Eldon himself, all of which failed, and Lord Eldon said, while speaking upon this subject in the case of *Westmeath* v. *Westmeath*, (1 *Jac. C. C.* 143,) "the conclusion to which I have come is, that though I might have decided differently if I had been one of the common law judges formerly, yet that it is impossible for me now to take upon myself to say that these deeds are not good at law." Repeated efforts were also made in the king's bench to overrule the case of *Radway* v. *Chambers;* and as late as the cases of *Jee* v. *Thurlow*, (2 *B. & C.* 547,) *Scholey* v.

Goodman, (1 *Carr. & P.* 36,) and *McDownell* v. *Murphy*, (2 *F. & Smith*, 279,) all of which have proved unavailing. In the former of these cases the court of king's bench held a deed legal and binding which recited that differences existed, and that the husband and wife had agreed to live separate during so much of her life as he should live, and which deed also made provision for her separate maintenance, and the court sustained an action of debt by the trustee, for arrears of an annuity.

Whatever may be said as to enforcing the agreement of separation, it is well settled, both in England and in this country, that the provision made for the support of the wife by the articles of separation will be enforced. Clancy says that if the "husband and wife agree to separate, and do separate accordingly, and if he have agreed to pay to her an allowance during such separation, equity will exact a due performance of the latter part of the contract, namely, the payment of the allowance, so long as the separation continues." In *Baker* v. *Cooper*, (7 *Serg. & Rawle*, 500,) the husband had obligated himself by bond to a trustee, on a separation from his wife, to pay to the trustee, in trust for his wife, $60 a year by half yearly payments during her life. These parties were subsequently divorced, and in an action brought for one of the installments, it was contended that the husband was released or discharged from his obligation by the divorce; but the court held otherwise, and gave judgment for the plaintiff. The supreme court of Connecticut, in the case of *Nichols* v. *Palmer*, (5 *Day*, 47,) decided that a provision in articles of separation, by which the husband bound himself to support the wife separately forever thereafter, was valid. The case was most elaborately considered. The supreme court of Massachusetts, in the case of *Page* v. *Trufant et al.* (2 *Mass. R.* 159,) held that a bond from the husband to the father of the wife for her maintenance, after a voluntary separation, was a valid contract, and sustained an action of debt upon the same. And the validity of these provisions for separate maintenance of the wife, where the separation has actually taken place, was recognized by this court in the case of *Baker* v. *Barney*, (8 *John.* 73; 2 *Kent's Com.* 101, 2*d ed.*,) and

Chancellor Walworth, in the case of *Carson* v. *Murray et al* (3 *Paige*, 483,) held that an agreement made between husband and wife, through the medium of a trustee, for an immediate separation and for a separate allowance to the wife for her support, was a valid agreement. And it was said by Vice Chancellor McCoun, in the case of *Anderson* v. *Anderson*, (1 *Edw. Ch.* 380,) that this court will not interfere, by virtue of its general jurisdiction, to compel a husband and wife to live together when they have separated, nor force them to live apart when they are cohabiting. But if they agree to live separately, and do separate accordingly, and the husband stipulate to allow the wife a maintenance, equity, acting upon the contract, will enforce such contract against the husband, so long as the separation continues. The same doctrine was affirmed by Vice Chancellor Hoffman in the case of *Champlin* v. *Champlin*, (1 *Hoff. Ch. R.* 55.) And the supreme court of Pennsylvania, in the case of *Hutton* v. *Dewey*, (3 *Barr's R.* 100,) again adjudged that articles of separation which provide for immediate and actual separation of husband and wife are valid and effectual, both in law and equity.

I would say, therefore, with Chancellor Walworth in the case of *Carson* v. *Murray*, that I do not feel myself at liberty to follow the dissenting dicta of some of the judges of the present day as to the policy of supporting such agreements, in opposition to the law, as settled by our predecessors. The doctrine of *stare decisis et non quieta movere* must retain some respect in the courts of this country, or the innovating spirit of the age will render very insecure the rights of persons and property. It is said, however, that admitting this agreement to pay the $100 a year for the support of the plaintiff's wife to be valid when entered into and while the parties were separated, it has been terminated by the husband's offer to take back his wife and live with her.

The rule is this: if the separation be intended to be only temporary, then if the husband offer to take back his wife and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allow-

ance to the wife. (*Clancy*, 367.) But if the separation be intended to be permanent, that is, during life, then the offer of the husband to cohabit with his wife does not put an end to the contract for separate maintenance. (*Clancy*, 367. *Shelford on Marriage and Divorce*, 630. *Roper on Husband and Wife*, 319. 16 *Law Lib.* 186, *N. S.* *Atherly on Marriage Settlements*, 383. 2 *Cox's Ch. R.* 102. 2 *Vernon*, 386.)

The rule is laid down by Mr. Bell in his recent admirable treatise on the law of property as arising from the relation of husband and wife, page 541, (*Law Lib. N. S. vol.* 57, *p.* 341, *Phil. ed.*) as follows: "Where there is a deliberate agreement between the husband and wife to live apart forever, it is not in the power of the husband at his pleasure to put an end to this state of circumstances by requiring her to return and live with him, or thereby to suspend or extinguish his covenant to make an allowance for her separate maintenance; for notwithstanding he should do so, an action would lie against him for performance of his covenant." "If, however, the separation is by the agreement contemplated to be only temporary, and the provision is limited to the duration of such temporary separation, the rule is otherwise." Applying this rule to the case under consideration, I do not see how the plaintiff's case is in any respect aided by his offer to take back his wife and provide for her in his family. The parties did not contemplate a temporary separation in the case under consideration, as is manifest from the provision which the plaintiff has made for the wife's separate support. The condition of his undertaking in that respect is, that he will pay $100 annually so long as the said Martha remains the wife or widow of the plaintiff. Such is the condition of the mortgage which the plaintiff seeks to be relieved from by this suit.

We have considered this case upon the assumption that, to uphold this mortgage, there must be a valuable consideration appearing for the covenant of the husband to provide the wife with a separate maintenance. It is said, however, by Mr. Bell, in the work above referred to, (*Law Lib. N. S. vol* 51 *p.* 336,) that such consideration is not required. In speaking

upon this subject he uses the following language: "A valuable consideration for the covenant of the husband to give the wife a separate maintenance is only necessary where the rights of the husband's creditors come into question; for, as already mentioned, where the interests of the creditors do not intervene, collateral covenants by the husband in an agreement for separation will receive effect, although the agreement be between the husband and wife alone, and the covenants be voluntary on his own part, and the enforcement should be asked in a suit by the wife herself," citing *Fitzer* v. *Fitzer*, (2 *Atk.* 571,) *Guth* v. *Guth*, (3 *Bro. C. C.* 617.) He says, speaking of these cases, "that Lord Rosslyn in *Leyard* v. *Johnson*, (3 *Vesey*, 361,) and Lord Eldon in *St. John* v. *St. John*, (11 *Vesey*, 571,) expressed doubts of the propriety of the decision in *Guth* v. *Guth*, but in *Ross* v. *Willoughby*, (10 *Price*, 2,) an objection of the absence of indemnity to the husband, taken by a demurrer to a suit for arrears of an annuity to the wife during separation, was overruled, and in *Clough* v. *Lambert*, (10 *Simons*, 174,) the objection of want of consideration, the agreement being under seal, was disregarded; and in *Frampton* v. *Frampton*, (4 *Beavan*, 287,) where the suit was by a wife to enforce a provision made for her by her husband without any indemnity from her trustee against her debts, or other consideration," Lord Langdale, after noticing the doubts expressed as to *Guth* v. *Guth*, observed that *Fitzer* v. *Fitzer* had never been overruled, and no case had decided that without the intervention of a trustee the husband might not voluntarily execute a deed or create a trust in favor of his wife, and that such deed or trust might not be binding as against him, even if the benefit of it should be dependent upon an existing or continuing separation, which was the principal, if not the only inducement for the whole arrangement." He adds: "As, therefore, in other cases a voluntary trust by the husband in favor of the wife will be effectual against him, so it will be in this, and not the less so that by creating it the husband has prevailed upon the wife to live apart from him and waive the enforcement of her conjugal rights." He continues at page

535, (57 *Law Lib.* 338, *N. S.*:) "It has been already seen that the courts will enforce against the husband those covenants in a deed of separation between him and his wife alone, by which he makes a provision for her maintenance, although there may not be any consideration flowing from her.

It is obvious, therefore, that when trustees for the wife are parties to an agreement for separation, effect will be given to the covenant for maintenance, although there may not be any consideration flowing from them for the covenant, such as indemnity against the debts of the wife, for she, like any other *cestui que trust*, has a right to call upon the trustees to perform their trust; and should the trustees arbitrarily destroy the instrument, the court will set it up again; or if they refuse to enforce the trust against the husband, a suit for that purpose by the wife by her next friend will be sustained." (*Cook* v. *Niggins*, 10 *Vesey*, 190. *Head* v. *Head*, 3 *Atk.* 547.)

It being extremely doubtful, to say the least, whether, upon authority, any consideration as between husband and wife need be shown to uphold the mortgage in question, and being of opinion that if such consideration were required, a sufficient one is shown in the evidence in this case, and being of opinion that we cannot set this mortgage aside as being against the policy of the law, without upsetting a long series of unbroken authority both in England and in this country, I do not see how we can do less than dismiss the complaint. There is no force in the objection raised that this mortgage cannot be upheld, for the reason that there were no articles of separation actually entered into between the plaintiff and his wife. This does not alter the case in the least; for all the authorities agree that such articles themselves, voluntarily entered into, without the sanction of the court, will not be enforced, either in law or equity. It is said by Mr. *Bell*, in his commentaries above cited, (51 *Law Lib. p.* 332, *N. S.*) that "while it is unquestionable, upon the authority of the cases that have been cited and of the dicta of eminent judges in other cases, that a covenant between husband and wife to live separate from each other will not be enforced either at law or in equity, it is equally certain that collatera'

or accessary covenants in a contract founded upon the motive of living separate, will receive effect both at law and in equity." If we are correct in the views above expressed, it follows that the plaintiff is not entitled to the relief demanded in the complaint, and that the same must be dismissed, with costs, which I hereby order and direct to be done.

[CHENANGO SPECIAL TERM, October 8, 1855. *Mason*, Justice. Affirmed at a general term of this court, in the sixth district, and subsequently by the court of appeals, on appeal by the plaintiff to that court.]

22 110
62 503
23h 73
24a 384

BUTLER *vs.* THE NEW YORK AND ERIE RAIL ROAD COMPANY.

Since the code, an assignee takes precisely the same interest, on the assignment of every species of demand, either at law or in equity, as he did before.

Hence if the demand is such as was capable of assignment before the code was adopted, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment, so as to give the assignee a right of action thereon.

Claims for mere personal torts, which die with the person—such as slander, assault and battery, false imprisonment, crim. con., seduction and the like—are not assignable; but claims for taking and converting personal property, or for injury to personal property, and it seems, generally, all such rights of action for a tort as would survive to the personal representatives of the party, may be assigned, so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code, as he formerly might do in the name of the assignor, at law.

Service of notice of the intended examination of an assignor, as a witness, in a justice's court, cannot be made upon the attorney of the opposite party, before such party has appeared, and before issue has been joined, in the action.

Whether service of a notice of that character, upon the attorney of a party, is good in any case? *Quære.*

THIS action was commenced in a justice's court, and the plaintiff's complaint was as follows: "The plaintiff complains of the defendants for that on or about the 21st March, 1853, at Union, in said county, defendants by their cars and engines carelessly and negligently ran over and killed one yoke of oxen

the property of one David C. Warner, of the value of $100, which claim has been assigned and belongs to the plaintiff, and for which he claims judgment to $100." The defendants denied the complaint. James H. Christopher testified upon the trial that he purchased this claim of Warner and sold the same to the plaintiff. David C. Warner testified that he owned the oxen at the time of the collision, and sold them to Christopher after they were killed. The plaintiff gave evidence showing that the oxen were killed by one of the defendants' engines running over them, and tending to show that they were killed by the negligence of the defendants' servants; and the justice rendered judgment for the plaintiff for $100 damages and $5 costs.

Upon the trial of the cause, when the plaintiff called J. H. Christopher as a witness, the defendants objected to his being sworn, on the ground that no notice of his being examined for the plaintiff had been produced. The plaintiff then produced a notice of the intention to examine said witness, with an affidavit made by Smith Park, showing that he served the same on Jacob Morris on the 20th day of September, 1854, which was the very day the summons in the cause was issued, the same being returnable on the 26th. It was also admitted upon the trial that this notice was served on Morris on the 20th of September, 1854. The defendants' counsel then further objected to said Christopher being sworn, on the ground that notice that an assignor would be sworn could not be served until after issue joined, and that such notice can only be served on the defendant; which objection was overruled, and the said Christopher was sworn and examined as a witness. The defendant appealed to the Broome county court, where the judgment was affirmed. The defendants then appealed to this court. There was no demand made of the defendants by the plaintiff for these oxen, or otherwise.

La Grange & Talbert, for the plaintiff.

Jacob Morris, for the defendants.

By the Court, MASON, J. The first question which I propose to consider in this case is, whether the plaintiff, as assignee of this cause of action, was entitled to recover those damages in this action. At common law a right of action for injuries to the person or character were not assignable. (19 *Wend.* 173. 7 *How. Pr. R.* 492.) These are mere personal torts and die with the party, and are not assignable. Such are actions of slander, libel, assault and battery, false imprisonment, crim. con., seduction, &c. On the other hand, where the injury affects the estate rather than the person, where the action is brought for damage to the estate and not for injury to the person, personal feelings, or character, the right of action could be bought and sold at common law. Such a right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of his assets, because it affects his estate and not his personal rights. (19 *Wend.* 73. 1 *Chitty's Pl.* 68. 2 *Maule & Sel.* 408. 9 *Serg. & Rawle*, 244. 6 *How. Pr. R.* 161. 1 *Peters' Rep.* 213. 7 *How. Pr. R.* 492. 1 *Seld.* 347.) Mere matters in action, however, were not so far transferable at common law as to pass the legal title, unless we except certain commercial instruments. The equitable title only passed, but when assigned with notice to the person from whom the liability is due, courts of law would protect the assignee against all prejudice from the acts of the assignor. (19 *Wend.* 75.) The action, however, had to be enforced in the name of the original party. The 111th section of the code adopts the equity and not the legal rule in regard to parties. It requires that every action must be prosecuted in the name of the real party in interest; but by an amendment of this section, in 1851, it is declared "*that this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.*" Before this section was amended in 1851, by adding the above restriction, it was held that in the class of cases where the right of action for a tort affected the property of the party, the right of action was assignable, so as to enable the assignee, under section 111 of the code, to sue in his own name. (6 *How. Pr. R.* 661. 7 *id.* 492

2 *Comst.* 293. 2 *Seld.* 347.) This amendment to section 111 has been supposed by some as intended to restrict this right, and to establish the general principle that nothing but a cause of action growing out of contract could be assigned, so as to give the assignee such an interest as would enable him to enforce his demand by civil action.

I do not see how any such construction can be given to this amendment. It is true, it does not authorize the assignment of a thing in action not arising out of contract. Nor does it forbid such assignment. The right rests upon precisely the same footing it did before, and an assignee takes precisely the same interest in the assignment of every species of demand, either at law or in equity, as he did before the code. It follows, therefore, that if the demand was such as was capable of assignment before the code, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment, so as to give the assignee a right of action therein. If I am right in the views above expressed, it follows that mere personal torts, which die with the person, such as slander, assault and battery, false imprisonment, crim. con., seduction and the like, are not assignable; but torts for taking and converting personal property, or for injury to personal property; and it seems generally all such rights of action for a tort as would survive to the personal representatives of the party, may be assigned so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code as he formerly might do in the name of the assignor at law. (*Contra*, 18 *Barb.* 500.)

It seems to me, however, that the service of the notice of the intended examination of Christopher, upon Morris, was not good service. At that time he had not appeared in the suit, and as his authority to appear was not shown until the 26th, and as no copy of it is returned, it seems to me that the service on him on the 20th was bad; and I very much doubt whether a service of such a notice on the attorney, who only appears in a justice's court as agent for the limited purpose of pleading in the suit and trying the cause, is ever good. The judgment of the county court, and that of the justice, should be reversed

for this cause alone. The objection was distinctly taken to the right of the plaintiff to examine the assignor as a witness, on the ground that no such notice of his intended examination had been given to the defendants, and the objection was overruled; and for this error the judgment must be reversed.

[Delaware General Term, July 8, 1856. *Shankland, Gray, Mason* and *Balcom*, Justices.]

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22 114
8h 335
21h 480
67a 336

The People, *ex rel.* Charles A. Peabody, *vs.* The Attorney General.

Under the provisions of the revised statutes and the code it is for the Attorney General, and not the supreme court, to determine whether, in any particular case, it is proper that an action to try the right to an office shall be brought, or not.

Consequently a mandamus will not lie, to compel the Attorney General to prosecute an action of that nature.

MOTION for mandamus. The papers upon which the motion was founded stated, that at the general election of judges held in November, 1855, the relator was voted for by the electors of the first judicial district to fill the vacancy occasioned by the death of Robert H. Morris, one of the Justices of the supreme court. The relator claimed that he was duly elected to fill such vacancy. The relator further alleged that Henry E. Davies, without any legal warrant, authority or right, had, since the 18th of February, 1856, held, used and exercised the office, and continued to do so. The relator further stated, that he desired to prosecute an action to be brought by the people, upon his relation, for the purpose of establishing his right to the office, and that he had made repeated applications to the attorney general to be permitted by the agency or advice of some competent counsellor of this court, to be approved by the attorney general, to commence and prosecute such an action; and that, to indemnify the state against the costs of such an action, he had exe-

cuted and delivered to the attorney general a bond, the sufficiency of which had been approved by him. It also appeared, from the papers upon which the motion was founded, that the attorney general refused to commence the action, or to allow it to be prosecuted in the name of the people. The relator asked for a mandamus, to compel him to prosecute the action.

Charles O'Conor and *H. L. Clinton*, for the relator.

J. K. Porter, for the attorney general.

HARRIS, J. At the common law no one but the officers of the crown could sue out the writ of *quo warranto*. It was regarded as the king's writ of right, to be issued in case of the usurpation of an office in violation of the king's right. This writ, at an early day, gave place to the more convenient proceeding of an information in the nature of a *quo warranto*. It was the practice of the officers of the crown to file informations in their own discretion, upon the application of private persons, but these were not named as relators in the proceedings. (*See Cole on Crim. Informations*, 127.) By the act of 4 and 5 *Wm. & M. ch.* 18, which took effect in 1693, no information could be filed "without express orders, to be given by the court of king's bench, in open court." The statute of 9 *Ann, ch.* 20, required that, in informations relating to *corporate* offices or franchises, the name of the relator should be mentioned in the information. From the passage of that act, which was in 1711, it was the practice to insert the name of the relator in all informations in the nature of a *quo warranto*, whether they related to a corporate office or any other. For a while after it was referred to the court to determine whether an information should be filed or not, it was very much a matter of course to allow it to be done. In *Rex* v. *Sargent*, (5 *T. R.* 467,) it was said by Lord Kenyon, Ch. J., that "when Lord Mansfield came into the court he found that informations in the nature of the *quo warranto* were had almost for asking. But he soon saw the impolicy and vexation of such a rule, and, therefore, before he granted

any such application, he canvassed the case, and unless he found strong ground for questioning the defendant's title, he, and the court sitting with him, always refused to let the information go. Ever since that period it has been the practice of the English judges to exercise a discretionary power in granting or withholding an information, according to the particular circumstances of the case." The same discretionary power was vested in the supreme court of this state upon the organization of our state government. By the fourth section of the act for rendering the proceedings upon writs of mandamus and information, in the nature of *quo warranto*, more speedy and effectual, passed February 6, 1788, it was provided that "in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any office or franchise within this state, it shall and may be lawful to and for the attorney general, with the leave of the supreme court, to exhibit one or more informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, who shall be mentioned in such information or informations as the relator or relators." (1 *R. L.* 100.) Under this statute the court exercised the right of determining whether an information should be filed or not. In *The People* v. *Sweeting*, (2 *John.* 184,) leave was refused merely upon the ground that the term of the office in dispute would expire before the right could be tried.

By the revised statutes of 1830 this discretionary power was withdrawn from the court, and vested in the attorney general. It is provided that an information, in the nature of a *quo warranto*, may be filed in the supreme court of this state, by the attorney general, against individuals, upon his own relation, or upon the relation of any private party, and without applying to such court for leave, when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, &c. (2 *R. S.* 582, § 28.) The same provision is re-enacted in the 432d section of the code. It is now for the attorney general, and not the court, to determine whether, in any particular case, it is proper that an action to try the right to an office should be brought or not.

That it was the intention of the legislature to transfer the exercise of this discretion from the court to the attorney general, and thus reinvest him with the power he had at the common law, is evident, I think, from the fact that, while thus authorizing the attorney general to file an information to try the right to a public office, without applying for leave, it still required such leave to be obtained before filing an information against a corporation. (2 *R. S.* 583, § 39. *Code*, § 430.) In the latter case it is expressly declared to be his duty to institute proceedings *upon leave being granted* by the supreme court, or a judge thereof.

There is nothing in the language of the statute which indicates an intention on the part of the legislature, when dispensing with the necessity of applying to the court for leave to commence the action, to surrender all control over the proceeding. On the contrary, it is plain, I think, that it was intended that the attorney general should, upon the circumstances of each case, as it should be presented to him, determine whether the public interest requires that a suit should be prosecuted. Although private rights are always more or less involved in the action, yet it is, in substance as well as in form, an action on behalf of the people. It must be prosecuted in their name, and by the officer whose duty it is to protect their rights.

The language of the statute, too, is guarded. An action *may* be brought by the attorney general. It is permissive. The power merely is conferred: it is for him to determine whether a fit case is presented. As to every thing but the form, the proceeding stands now as it did at the common law. The usurpation of an office, though it frequently involves little else than private rights, is, in the eye of the law, a public offense. The only remedy is by an action in the name of the people. It is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility. It is not the province of the court to control his discretion, or to authorize a private prosecutor to assume his office, and in his name to wield the power of public prosecutor.

I know it may be said, perhaps in this very case, that with a

fair show of right to an office, a party may be entirely remediless against an intruder. This may be so. It is quite possible that cases may arise in which the disturbing influence of party feeling may so affect the action of the attorney general as to result in great injustice to individuals. But this is a question for the consideration of the legislature, not for the court. The power of determining whether the action shall be commenced must exist somewhere. As we have seen, it has sometimes been vested in the court, and sometimes in the public prosecutor. Our legislature have seen fit to invest the attorney general with this discretion. His office is a public trust. It is a legal presumption that he will do his duty; that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is, in its nature, a judicial act, from which there is no appeal, and over which courts have no control. The motion for a mandamus must, therefore, be denied.

[Albany Special Term, July 29, 1856. *Harris*, Justice.]

Pomeroy *vs.* Ainsworth and others.

22 118
38 363
46 274
53 355
63 427
63 431
34h 197
15a 228
29a 340
30a 265
32a 420

By a written agreement, between P. of the first part and A. & H. of the second part, P. agreed to cut 50,000 pine logs from townships 22 and 26 in F. county, and to deliver them to A. & H. on certain lakes and ponds, and on the Racket river, and to drive them down such river to the saw mill pond of P., and to saw out such logs for A. & H. In consideration whereof A. & H. agreed to pay and advance to P., at the execution of the agreement, $3000, and thereafter, at different times, in the whole, 50 cents for each log driven into said pond; and also the further sum of $1.25 for every 1000 feet for all boards and lumber sawed by P. A. & H. were to retain 10 cents so to be advanced, for each log, until the deduction should amount to the $3000 so advanced by them to P.; and all payments and advances were to be made by A. & H. in the bills of the Bank of C., so long as said bank continued to redeem in Boston or New York; and P. was to exchange such bills for funds current in Boston or New York, after they had been returned to the bank and were pr-

sented to him, &c. A. & H. were to use their best skill in selling the lumber at the highest prices, &c., and all proceeds of the sales were to be applied, in the first instance, towards repayment of all advances of A. & H., with interest, and of the expenses of the sale; and the balance was to be paid by A. & H. to the bank of C. upon P.'s prior indebtedness to that bank. A. & H. also agreed to bestow their time and services in the business, either in measuring the logs, &c. or in the sale of the lumber, for which they were to be paid by P. $1000 each, for the year, &c. Concurrently with this agreement P. conveyed to A. & H. his interest in said townships 22 and 25, being about 4000 acres of timber lands, from which the 50,000 pine logs were to be cut.

Held, that this transaction was not in form an agreement for a loan of money. And A. & H. having denied, in their answers, that P. applied to them for a loan of money, or that they agreed or proposed to loan him any money, and that denial being confirmed by the affidavits of three witnesses who were present during the negotiation and at the execution of the agreement; *it was further held*, that the agreement was not void as being for the loan or forbearance of money, within the meaning of the statute of usury.

And it appearing from the pleadings and affidavits that the agreement was negotiated, made and executed in Vermont, where A. & H. resided, and where the Bank of C. was located; that $3000 was advanced to P. by A. & H. in that state; that at the time of the execution of the agreement it was intended that the lumber, or a greater portion thereof, should be sent to Boston, and other places in New England, for market; that it was intended and understood by the parties that the interest which A. & H. would receive, if any, for their advances, under the agreement, should be computed according to the laws of Vermont, at the rate of six per cent per annum, *it was also held*, that the agreement, at least so far as respected the amount of interest to be paid to A. & H. for their advances to P., was made in reference to the laws of Vermont, which must govern its construction, and determine its validity. That such agreement must be presumed to be legal, by the laws of that state, inasmuch as the contrary had not been shown. And if legal by the laws of Vermont, that it was protected from the operation of the usury laws of this state.

Held further, that the agreement being silent as to the place where the advances made by A. & H. were to be repaid. such advances were to be repaid to them in Vermont, that being their place of residence.

To constitute a usurious contract there must be—1, a loan, and 2, an agreement to pay illegal interest. And it is essential to the nature of a loan that the thing borrowed is at all events to be returned. Where the principal is *bona fide* put in hazard it is no loan; and it is no usury to take more than legal interest.

It is also essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is made dependant on the will of the borrower, as where he may discharge himself from it by the punctual payment of the principal, the contract is not usurious.

As a general rule, the law of the place where contracts purely personal are made must govern as to their construction and validity, unless they are to be performed in another state or country, and were made in reference to the laws of such state or country, in which case their construction and validity depend upon the law of the place of performance.

If no place of performance is expressly stated, or implied from the terms of the contract, the law of the place where it was made will govern.

If a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed.

Where a contract for the payment of money is made in one place, and payment in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable.

A party alleging that an agreement is invalid, under the usury laws of another state, must show what are the laws of that state in relation to usury. In the absence of such proof, the presumption is that the agreement is valid, under those laws.

MOTION by the defendants, Ainsworth & Hunt, to vacate an injunction order. The facts appear in the opinion of the court.

W. A. Dart, for the plaintiff.

H. L. Knowles and *J. Mullin*, for the defendants.

PAIGE, J. The injunction order in this case enjoins the defendants, Ainsworth & Hunt, from selling, removing, disposing of, or in any way interfering with, the saw logs and lumber mentioned in the complaint, and cut and manufactured under the agreement set forth therein. This injunction order is sought to be sustained upon the following grounds, viz: 1. That such agreement, as well as the mortgage executed by the plaintiff to the Bank of Castleton, and the deed from the plaintiff to the defendants, Ainsworth & Hunt, of the $\frac{1}{8}$ of 931,800 acres in townships 22 and 25 Franklin county, from which the logs were cut, were usurious. 2. That Ainsworth & Hunt have threatened to sell the logs without consulting the plaintiff, in violation of the agreement. The agreement provides that in case the plaintiff shall neglect or refuse to exchange, for funds current in Boston

or New York, the Bank of Castleton bills which had been advanced to him by Ainsworth & Hunt as required in the agreement, Ainsworth & Hunt should have the right to sell a sufficient quantity of the logs to repay all the advances previously made by them to the plaintiff, provided that on the sale the plaintiff should have the right to be the purchaser at the highest price offered by any other person. The defendants, Ainsworth & Hunt, in their answer, state that the plaintiff, on the 1st of October, 1855, at Castleton, gave them notice that he should not thereafter exchange any of such bank bills for funds current in Boston or New York; and that on or about the 16th of November, 1855, the plaintiff's agent in New York refused to exchange a package of $600 of said bills, and that the plaintiff, on or about the 23d November, 1855, at Potsdam, refused to exchange another package of $900 of such bills. These statements in the answer are not denied in the plaintiff's affidavit made in opposition to this motion; and the affidavit of Foster, the plaintiff's agent in New York, is confined to a denial of his refusal to redeem the package of $600 of said bills. The defendants, Ainsworth & Hunt, in their answer, deny that they have threatened to sell, or that they intended to sell, the logs without consulting the plaintiff in relation thereto, or in violation of the terms or conditions of the agreement. The affidavit of Hewitt, annexed to the complaint, to the effect that the defendant Ainsworth offered to sell him the logs at Potsdam, is not inconsistent with the denial in the answer; as the defendants, Ainsworth & Hunt, have a right, under the agreement, to sell the logs, in case the plaintiff refuses to exchange the bills advanced to him by them, provided they accord to him the right to purchase at the highest price offered by any other person. If Ainsworth & Hunt have, under this agreement, acquired the right to sell a sufficient quantity of the logs to repay their advances, in consequence of the refusal of the plaintiff to exchange the bills of the Bank of Castleton as required in the agreement, which refusal is shown by the answer, that right cannot be defeated because the sale would be prejudicial to the plaintiff. The injunction order cannot therefore be sustained on the

ground of an intention on the part of the defendants, Ainsworth & Hunt, to sell to third persons a sufficient quantity of the logs to repay previous advances, after offering to the plaintiff to allow him to become the purchaser, for the highest price offered by any other person. If it had appeared that Ainsworth & Hunt intended to violate the agreement by a sale of the logs, to the prejudice of the plaintiff, it is questionable whether an injunction could have been issued to restrain them, unless it should be shown that they were irresponsible, as the plaintiff would have a perfect remedy by an action for damages, against them. (*Willard's Eq. Jur.* 279, 364.)

The remaining question to be considered is, whether the agreement is void for usury. In discussing this question the first point to be considered is, whether the transaction between the parties was or was not a contract for a loan of money. In the agreement the plaintiff agrees to cut 50,000 pine logs from townships 22 and 25 in Franklin county, and to deliver them to the defendants, Ainsworth & Hunt, on certain lakes and ponds and on the Racket river, and to drive them down such river to the saw mill pond of the plaintiffs, and to saw out such logs for Ainsworth & Hunt. In consideration whereof Ainsworth & Hunt agree to pay and advance to the plaintiff, at the execution of the agreement, $3000, and thereafter, at different times, in the whole, 50 cents for each log driven into said pond; and also the further sum of $1.25 for every 1000 feet for all boards and lumber sawed by the plaintiff; Ainsworth & Hunt to retain 10 cents so to be advanced, for each log, until the deduction amounted to the $3000 to be advanced by them to the plaintiff; and all payments and advances were to be made by Ainsworth & Hunt in the bills of the Bank of Castleton, so long as said bank continued to redeem in Boston or New York, &c.; and the plaintiff was to exchange such bills for funds current in Boston or New York, after they had been returned to the bank and were presented to him, &c. Ainsworth & Hunt were to use their best skill in selling the lumber at the highest prices, &c and all proceeds of the sales were to be applied, in the first instance, towards repayment of all advances of Ainsworth & Hunt,

with interest, and of the expenses of the sale; and the balance was to be paid by Ainsworth & Hunt to the Bank of Castleton upon the plaintiff's prior indebtedness to such bank. And in such agreement Ainsworth & Hunt agreed to bestow their time and services in the business, either in measuring, &c. the logs, &c. or in the sale of the lumber, for which they were to be paid by the plaintiff $1000 each, for the year, &c. Concurrently with this agreement the plaintiff conveyed to Ainsworth & Hunt his interest in said townships 22 and 25, being about 4000 acres of timber lands, from which the 50,000 pine logs were to be cut.

The question to be determined is, whether this agreement is a contract for the loan of money. It is insisted, on the part of the defendants, that the agreement on its face, in connection with the conveyance of the 4000 acres of land, is substantially a sale and conveyance of the timber lands and logs to Ainsworth & Hunt, by the plaintiff, and an agreement on the part of Ainsworth & Hunt to pay the plaintiff for his work and labor in cutting and removing and driving the logs to the saw mill of the plaintiff, and manufacturing the same into boards and lumber, 50 cents for each log, and the further sum of $1.25 for every 1000 feet of boards and lumber; with an agreement on the part of Ainsworth & Hunt to apply the purchase money of the lands and logs (being the proceeds of the sales of the lumber and logs) towards the repayment of the advances made by Ainsworth & Hunt, with interest and the expenses of the sales, and to pay the balance to the Bank of Castleton on the previous debt owing to it by the plaintiff; and an agreement on the part of the plaintiff to pay Ainsworth & Hunt $1000 each for their time and services in the business and in the sale of the lumber.

Perhaps the agreement might more properly be regarded as in substance and legal effect a conveyance or an assignment to Ainsworth & Hunt, in trust, of the timber lands and logs, to cut and manufacture the logs, to sell the boards and lumber, and out of the proceeds of the sales to repay themselves their advances, and to pay the expenses of the getting out and manufacturing of the logs, and of the sales of the lumber, and $1000 to each for their services; and to pay the balance on the pre

vious debt of the plaintiff to the Bank of Castleton. There is nothing expressly stated in the agreement, in relation to a loan of money; and the defendants, Ainsworth & Hunt, in their answer, deny that the plaintiff applied to them for a loan of money, or that they agreed or proposed to loan him any money, as alleged in the complaint. This allegation in the answer is confirmed by the affidavits of three witnesses who were present during the negotiation and at the execution of the agreement. These witnesses swear that there was no application or proposal by the plaintiff for a loan of money, and that neither party expected or intended to make or obtain a loan of money. If the transaction, however, although not in form a contract for a loan of money, was nevertheless intended as such loan, and the form in which it was clothed was devised as a mere cover for usury, it cannot escape condemnation as a violation of the statutes of usury. To constitute a usurious contract there must be, 1st, a loan, and 2d, an agreement to pay illegal interest; and it is essential to the nature of a loan that the thing borrowed is at all events to be returned. Where the principal is bona fide put in hazard it is no loan; and it is no usury to take more than legal interest. (*Ord on Usury*, 23, 39, 64. *Com. on Usury*, 56, 4 *Law Lib.* 2 *Peters*, 537.) It is also essential to the nature of usury, that a certain gain exceeding the legal rate of interest is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is made dependant on the will of the borrower, as where he may discharge himself from it by the punctual payment of the principal, the contract is not usurious. (*Ord on Usury*, 48, 49. *Kelly on Usury*, 76, 44 *Law Library*.)

The cases of *Hall* v. *Daggett*, (6 *Cow.* 653,) and of *Quackenbush* v. *Leonard*, (9 *Paige*, 339,) expressly affirm the principle, that it is essential to the nature of a loan that the principal is at all events to be returned. In *Hall* v. *Daggett*, Daggett agreed with Hall to carry on the business of preserving fresh provisions, and in consideration of the use of $600 advanced by Hall, Daggett made him his only agent for selling the provisions, for 10 years, and agreed that he should be allow-

3d 20 per cent on all sales, and one third of the net proceeds after deducting the 20 per cent to apply on the amount advanced till it should be liquidated; Hall to furnish a repository at his own cost, and to be responsible for the sales; and it was held that the contract was not usurious. One reason assigned for the decision was that Hall's principal was put at hazard, as his security for its repayment was confined to the proceeds of the sales, and they might prove insufficient to reimburse him. In *Quackenbush* v. *Leonard*, (9 *Paige*, 346,) three persons, Leonard, Quackenbush and Webster, agreed to purchase lands, for their joint benefit, and they also agreed that Leonard should advance all the money upon the purchase, to be refunded out of the proceeds of the sale only, and that he should receive more than one third of the land or the proceeds thereof. Held that the agreement was not a contract for a loan or forbearance of money, and was not usurious. The decision was placed expressly upon the ground that there was no agreement on the part of Quackenbush and Webster to refund any part of the purchase money advanced by Leonard, if the lands should not sell for enough to reimburse him, with interest. The case before the court resembles the cases of *Hall* v. *Daggett*, and *Quackenbush* v. *Leonard* in this, that there is no agreement on the part of the plaintiff to repay Ainsworth & Hunt their advances in case the proceeds of the sales of the logs and lumber should be insufficient for that purpose. The security of Ainsworth & Hunt for repayment is upon the logs and lumber only. As the logs and lumber may turn out to be insufficient to reimburse them, it cannot be said that the principal money to be advanced was to be repaid at all events; that it was not put at hazard.

If it was in the power of the plaintiff to discharge himself from the burden or loss of exchanging the bills of the Bank of Castleton, (in which it is alleged the usury consists,) by repaying to Ainsworth & Hunt, on account of their advances, an amount equal to the bills presented to him to be exchanged, it might be also objected to the charge of usury in this case that here there was no certain gain, beyond legal interest to accrue to Ainsworth & Hunt as the consideration for their advances

(7 *Mass. Rep.* 433. 19 *John.* 334, 335, 336, *and cases cited* 8 *Mass. Rep.* 259. 10 *id.* 284.)

But if the agreement was a contract for a loan of money, and if, according to the laws of New York, it is usurious, it can nevertheless be sustained in this state if it is to be construed according to the laws of Vermont, and if under those laws it is a valid agreement. The pleadings and affidavits show that the agreement was negotiated, made and executed in Vermont, and that the defendants, Ainsworth & Hunt, reside in Vermont, and that the Bank of Castleton is a bank located and doing business in that state. The defendants, Ainsworth & Hunt, in their answer allege that at the time of the execution of the agreement it was intended that the lumber, or a greater portion thereof, would be sent, for market, to Boston and other places in New England; and three witnesses, whose affidavits were read by the defendants on the hearing of the motion, state that the rate of interest which Ainsworth & Hunt would receive, if any, for their advances under the agreement, was spoken of during the negotiation by the parties, and that it was intended and understood by all of them that such interest would be computed according to the laws of Vermont, at the rate of 6 per cent per annum. This evidence must outweigh the unsupported statement of the plaintiff, in his affidavit, that the rate of interest was not mentioned in any part of the negotiation. It is conceded that the first $3000 was advanced by Ainsworth & Hunt to the plaintiff in Vermont. If the plaintiff was in error as to the conversation, during the negotiation in respect to the rate of interest, he may have been equally mistaken in his statement that it was understood and contemplated at the time of making the contract, that the money to be advanced by Ainsworth & Hunt, except the first $3000, should be both advanced and repaid in New York. The plaintiff, in his opposing affidavit, does not deny the allegation in the answer, that at the execution of the agreement it was intended that the lumber should be sent for market to New England.

The pleadings and affidavits, therefore, establish the following facts, viz: The agreement was negotiated, made and exe-

cuted in Vermont; the defendants now reside in Vermont, and resided there at the time of the execution of the agreement; $3000 was advanced, under the agreement, by the defendants, Ainsworth & Hunt, to the plaintiff, in Vermont; the parties, at the execution of the agreement, agreed that the interest on the advances of Ainsworth & Hunt should be computed according to the laws of Vermont, at the rate of 6 per cent per annum; at the execution of the agreement it was intended by the parties that the lumber, or the greater part thereof, should be sold in some one of the New England states. The work and labor of the plaintiff in getting out, and in the manufacture of, the logs, were to be performed in New York; and the services of Ainsworth & Hunt in the measuring and marking the logs, and the care of the lumber at the saw mill, were to be rendered in New York; but so far as they consisted in making sales of the lumber, they were to be rendered in the places where such sales were made. The agreement being silent as to the places where the advances subsequent to the execution of the agreement were to be made, to the plaintiff, and where they were to be repaid to Ainsworth & Hunt out of the proceeds of the sales of the lumber, the law must determine them. It is a settled principle, where no place of payment is mentioned in the contract, that its legal construction is, that the money is to be paid to the creditor where he resides, or wherever he may be found. (6 *Paige*, 630. 10 *Wheat.* 367. 2 *Parsons on Cont.* 95, 99.) Applying this principle to the agreement in question, I think we ought to expound it as requiring Ainsworth & Hunt to make the advances (after the payment of the $3000) to the plaintiff in New York, where his labor is to be performed and where he resides; and as implying that the proceeds of the sales of the lumber are to be received by Ainsworth & Hunt at their residence in Vermont, and to be applied by them in that state in repayment of their advances, and on the debt of the plaintiff to the Bank of Castleton.

As a general rule the law of the place where contracts purely

personal are made, must govern as to their construction and validity, unless they are to be performed in another state or country, and were made in reference to the laws of such state or country, in which case their construction and validity depend upon the law of the place of performance. (6 *Paige*, 630. *Story on Confl. of Laws*, § 242. 2 *Kent's Com. 7th ed.* 577, *note a.* 2 *Parsons on Cont.* 95, 96. 1 *Cowen*, 108. 2 *Burr.* 1077. *Story on Contracts*, §§ 653, 654. 10 *How. Pr. R.* 8. 4 *Cowen*, 510, *note.* 17 *John.* 518.) If no place of performance is expressly stated, or implied from the terms of the contract, the law of the place where it was made will govern. (*Story on Confl. of Laws*, § 282.) If a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed. (*Story on Cont.* § 655. *Story on Confl. of Laws*, §§ 282, 284.) Where a contract for the payment of money is made in one place, and payment in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. (*Story on Confl. of Laws*, § 291. 2 *Parsons on Cont.* 95, 96, 98.) If the advances, therefore, by Ainsworth & Hunt to the plaintiff are in law payable to them in Vermont, the interest on such advances is to be regulated by the laws of that state; and the usury laws of such state must govern the construction of the contract, at least so far as it relates to the moneys due and payable to Ainsworth & Hunt.

But I think the agreement, or the expressed understanding of the parties at the time of the execution of the contract, that the rate of interest should be regulated by the laws of Vermont, is decisive upon the question of usury. In *Chapman* v. *Robertson*, (6 *Paige*, 634,) it was held by Chancellor Walworth that upon a contract for a loan of money, made in one country and payable in another, the parties might stipulate for the payment of interest according to the laws of the place where the contract is made. A like decision was made in *Depeau* v *Humphreys*, (20 *Martin's La. Rep.* 1,) in *Peck* v

Mayo, (14 *Verm. Rep.* 33,) and in *Pratt* v. *Adams*, (7 *Paige*, 632.) In this latter case, the chancellor says, if the contract is not illegal by the laws of the country where it was made and the money loaned, the fact that drafts on which the loan was made were payable in New York, will not render them void under our usury laws. *Parsons*, in his *Treatise on Contracts*, (*vol.* 2, *p.* 95,) sustains the principle of these cases.

In the present case, the parties made the agreement expressly in reference to the laws of Vermont, as to interest; and those laws must therefore govern its construction, and determine its validity, at least so far as respects the question of usury. (6 *Paige*, 630, 634. 2 *Parsons on Cont.* 95. 14 *Verm. Rep.* 33. 2 *Kent's Com.* 7*th ed.* 576, 577, *note a.*) In all questions in relation to usury, parol evidence is admissible to establish or rebut it. (*Cowen & Hill's Notes*, 1447.) As the laws of Vermont are to govern the construction and determine the validity of the agreement, in respect to the amount of interest agreed to be paid, the plaintiff, as he alleges the illegality of the agreement, must show what are the laws of Vermont, in relation to usury. In the absence of such proof, the presumption is that the agreement is a valid agreement, under those laws. (7 *Paige*, 632. 1 *id.* 220. 2 *Seld.* 134.) Suspicion, alone, will not invalidate a contract. (*Per Gardiner, J.* 2 *Seld.* 134. *Cowen & Hill's Notes*, 1136, 1138, 1139.) It is a general rule that a party seeking advantage from a foreign law, or the law of another state of the union, must prove its existence. (*Cowen & Hill's Notes*, 1136. 3 *Dana's Rep.* 495. 8 *John.* 189, 193.) It seems, however, that upon a mere common law question, the legal presumption is that the common law of a sister state is similar to that of our own. (10 *Wend.* 75.)

Having arrived at the conclusion that the agreement, at least so far as respects the amount of interest to be paid to the defendants, Ainsworth & Hunt, for their advances to the plaintiff, was made in reference to the laws of Vermont, and that it requires the advances of Ainsworth & Hunt to be repaid in that state, such agreement must be presumed to be legal, by the laws of

Vermont, as the contrary has not been shown by the plaintiff. And if legal by the laws of Vermont, it is protected from the operation of the usury laws of this state.

I must therefore decide that the injunction order be vacated.

[Fulton Special Term, April 1, 1856. *Paige*, Justice. Affirmed by the General Term, September, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

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22 130
24 517
28 280
4h 219
90a 83

The Northern Rail Road Company *vs.* Page.

A rule or custom of a rail road company, requiring passengers, soon after starting, to surrender their passage tickets to the conductor and receive his checks in place of them, is a reasonable rule or custom.

And where a passenger, with knowledge of such custom, purchases a ticket, the law will presume that he does so in reference to the custom.

The contract, on the part of the rail road company, is that they will carry the passenger over their road, provided he surrenders his ticket to the conductor when it is demanded; and the passenger will not be entitled to his passage in the cars, without the surrender of his ticket.

His refusal to deliver up his ticket to the conductor, when it is demanded, will justify the latter in exacting from him his fare, in cash, and on his refusal to pay his fare, he may be expelled from the cars.

If he leaves the cars without giving up his ticket, or paying for his passage, an action will lie against him for the amount of his fare.

THIS was an action commenced in a justice's court, to recover the sum of $3 for transporting the defendant in the plaintiffs' cars from Rouse's Point to Madrid Station. The defendant had a ticket, purchased by him from the receiver of the Hudson River Rail Road Company, for one passage from Rouse's Point to Ogdensburgh; of which the following is a copy: "One passage. Rouse's Point to Ogdensburgh. Kendrick, receiver Hudson R. R. R. N. Y. to Ogdensburgh." Stamped June 1. The defendant entered the plaintiffs' passenger cars at Rouse's Point, going west, on the 2d of June, 1853. After the cars started, the conductor called on him for his ticket. The defendant stated that he was going to Ogdensburgh or Madrid, and that he had a ticket, which he showed

tc the conductor. Subsequently, and after the cars had passed one station, the defendant was requested by the conductor to surrender his ticket and take the ordinary conductor's check; of which the following is a copy: "Northern Rail Road. A. N. Y. E. Good for this trip only." The defendant claimed that his ticket entitled him to ride to Ogdensburgh, and that he should keep it as evidence of his right; preferring it to a check. The conductor demanded of him to pay his fare in money, which the defendant refused to do, on the ground that he had already paid it and had a ticket. The ordinary fare from Rouse's Point to Madrid was $3, and to Ogdensburgh the same; Madrid being 18 miles east of Ogdensburgh. It was proved that an agreement had previously been made between the plaintiffs and the Hudson River Rail Road Company, that each might sell tickets on the other's line, and which should be paid for to the company carrying the passenger, when returned to the company issuing them; that it had always been the custom on the plaintiffs' road for the conductor to take up the tickets and give checks in place of them to the passengers, soon after the passengers entered the cars; that the defendant had knowledge of this custom, and that he got off the cars at Madrid, without surrendering his ticket. The justice rendered a judgment in favor of the plaintiffs, for $3 and costs; which judgment was affirmed by the county court, and the defendant appealed to this court.

W. C. Cooke, for the appellant.

W C. Brown, for the respondents.

PAIGE, J. It appears, by the evidence, that it has always been the custom, on the plaintiffs' road, for the conductor to take up the tickets and give checks in place of them to the passengers, soon after their entrance into the cars. The proof clearly shows that the defendant had knowledge of this custom; and the justice, in rendering judgment for the plaintiffs, must have so found the fact. Under these circumstances, the law

will presume that the defendant when he purchased the ticket introduced in evidence, did so in reference to this custom on the road of the plaintiffs. (5 *Hill*, 439. 19 *Wend.* 386. 12 *id.* 574. 6 *John. Ch.* 437. 4 *Hill*, 104, 107.) The question, as was said by Justice Dewey in *Cheney* v. *B. & M. R. R. Co.* (11 *Metc.* 123,) is, what was the contract between the plaintiffs and the defendant. The law will imply, under the circumstances of this case, that the contract on the part of the plaintiffs was to convey the defendant over their road, provided he surrendered his ticket to the conductor, when it was demanded, as required by the custom of the road. Under this contract the defendant would not be entitled to his passage in the plaintiffs' cars without the surrender of his ticket; and his refusal to deliver up his ticket to the conductor, when demanded, would justify the latter in exacting from him his fare, in cash; and on his refusal to pay his fare, putting him out of the cars. The custom in question was a reasonable custom. The ticket purchased by the defendant, if not surrendered, could be used to secure a second or any number of rides over the road, without the payment of fare. Its surrender, therefore, was necessary to the protection of the company from fraud. The form of the ticket entitled the *bearer*, whoever he might be, to one passage over the plaintiffs' road. The purchaser, after riding, himself, upon the ticket, could sell or hand it to another, who, with the ticket, could also secure a passage over the road, without the payment of fare. Besides, the surrender of the ticket was necessary to enable the plaintiffs to demand from the Hudson River Rail Road Company the price of the ticket. This, under their agreement with that company, they could not do until they returned to that company the ticket. The ticket may be regarded as expressing only a part of the agreement entered into between the parties. It does not purport on its face to be a complete agreement. In all such cases the other parts of the agreement may be proved by parol evidence. (25 *Wend.* 419. 2 *Cowen & Hill's Notes*, 1471. 9 *Pick.* 338.) In the case of *Cheney* v. *The B. & M. Rail Road Co.* (11 *Metc.* 123,) Justice Dewey held that when a passenger purchased a rail road ticket, the

ticket implied a contract that he was to be carried in the usual manner in which passengers were carried, who had tickets of the same kind; and that even where the passenger was ignorant of the rules and regulations of the company, the ticket only secured to him a passage in conformity to such rules and regulations.

The precise question in this case arose in *Loring* v. *Alborn* tried before Mellen, J., in the court of common pleas of Massachusetts in 1848; reported in 1 *Law Rep. N. S.* 461. Loring, a passenger in rail road cars, on the Boston & Maine Rail Road, sued Alborn, the conductor of the train, for putting him out of the cars, on his refusing to give up his ticket. It was a rule of the road that passengers must, immediately after the starting of the train, surrender their tickets to the conductor. MELLEN, J., on the trial, ruled that this regulation of the road was reasonable; and that the plaintiff had no right to retain his ticket until he got near the end of his route, even if he had not previously known of the existence of such regulation; and that on his refusal to give up his ticket the conductor was justified in ejecting him from the cars. This case was taken up before the supreme judicial court of Massachusetts, upon another ruling of Judge Mellen. FLETCHER, J., in delivering the opinion of the supreme court, took no exception to the decision of Judge Mellen in relation to the right of the conductor to eject the plaintiff from the cars. (4 *Cush. R.* 608.)

In my opinion the decision of the justice was right. The judgment of the county court must therefore be affirmed.

[CLINTON GENERAL TERM, May 6, 1856 *C. L. Allen, James, Rosekrans,* and *Paige,* Justices.]

22 134
53 604

ROGERS *vs.* ACKERMAN.

The question whether words used by a vendor, upon a sale of horses, in respect to their ages, amount to a warranty, is a question of fact for the jury.

No particular phraseology is necessary to constitute a warranty; but the words used by the vendor should be understood by the parties as an absolute assertion, and not as the expression of an opinion. And it is for the jury to determine how the words were understood and intended by the parties.

Where, on a trial before a justice, there is evidence on both sides, the judgment of the justice cannot be reversed by the county court, although the verdict of the jury was against the weight of evidence. And if, in such a case, the county court reverses the judgment of the justice, its judgment of reversal will be reversed by the supreme court.

Witnesses acquainted with the value of personal property may testify to their opinion of its value. The rule that witnesses must state facts, and not opinions, has no application.

Where the plaintiff, upon a sale of a pair of horses to the defendant, warranted them to be sound and of the ages of 10 and 11 years only, and in an action by the plaintiff to recover the price, the defendant proved that the horses, at the time of the sale, were over 20 years old; *Held* that he might also prove, by witnesses who knew the horses, and who were acquainted with the value of that kind of property, that if the horses had been only 10 or 11 years old at the time of the sale, they would have been worth from $60 to $100 more than they actually were, being 20 years old and upwards.

APPEAL from a judgment of a county court, reversing the judgment of a justice's court. The complaint was on a note of hand for $65, dated Nov. 19, 1852, on which $20 had been paid. The answer set up, by way of recoupment, that the note was given by the defendant to the plaintiff for a pair of horses, which the plaintiff had sold to the defendant and had warranted to be sound, and of the ages of 10 and 11 years and no older, when in fact they were 20 years old at the time. On the trial the defendant proved that the plaintiff, after the sale of the horses, and in the winter of 1854, said that he sold the horses as he bought them—one for *nine years* old and the other for *eleven years* old. The defendant also proved that the horses, at the time of the sale, were over 20 years old, and that the plaintiff, about May, 1851, had said the horses were then 18 and 19 years old; and that if the horses had been only 10 or 11 years old at the time of the sale, they would have been worth

from $60 to $100 more than they actually were, being 20 years old and upwards. All the witnesses who spoke of the value of the horses, except one, (J. Dunn,) testified that they knew the horses; and it may be inferred from the testimony of Dunn that he was also acquainted with the horses. The plaintiff objected to the testimony of the witnesses as to the value of the horses, upon the ground that the defendant had not proved the horses were older than they were represented to be, and that the opinions of the witnesses was not proper evidence of the difference in value. The plaintiff proved that the defendant, in a conversation with a witness, had in the fall of 1852, said that the plaintiff called the horses 16 and 18 years old. It did not distinctly appear whether the defendant referred to a declaration of the plaintiff made before, at, or after the sale. The jury rendered a verdict for the defendant, upon which the justice rendered judgment. The county court reversed the judgment of the justice.

W. C. Brown, for the appellant.

C. G. Myers, for the respondent.

By the Court, PAIGE, J. The question whether the words used by the plaintiff, at the sale of the horses, as to their ages, amounted to a warranty, was a question of fact for the jury. (10 *Wend.* 411.) No particular phraseology is necessary to constitute a warranty, but the words used by the vendor should be understood by the parties as an absolute assertion, and not the expression of an opinion. And it is for the jury to determine how the words were understood and intended by the parties. (8 *Cowen*, 26, 7. 4 *id.* 442. 20 *John.* 203.) I think the evidence in this case was sufficient to be submitted to the jury to determine whether the words used by the plaintiff amounted to a warranty, or not; and that their verdict in favor of the defendant was not so unsupported by the evidence as to justify the county court in disturbing it. The rule seems to be, that where there is evidence on both sides, the judgment

of the justice cannot be reversed by the county court, although the verdict of the jury was against the weight of evidence; and that if, in such case, the county court should reverse the judgment of the justice, its judgment of reversal will be reversed by the supreme court. (21 *Wend.* 305. 18 *id.* 141, 144, 145. 3 *Hill*, 75. 15 *Wend.* 490. 18 *Barb.* 350. 8 *How. Pr. Rep.* 377. 2 *Sand. R.* 222. 12 *Barb.* 387.) The evidence as to the difference between the actual value of the horses, regarding them as over 20 years old, and what their value would have been had they been only 10 and 11 years old, was competent evidence. For the witnesses who testified to such difference in value were acquainted with the horses, and are presumed to have been acquainted with the value of horses. Witnesses acquainted with the value of personal property are allowed to testify to their opinion of its value. (5 *Denio*, 84.) The rule that witnesses must state facts, and not opinions, has no application to such cases. The form of the question to the witnesses who spoke to the difference in value of the horses, was unobjectionable. The objection was that the defendant had not previously proved that the horses were older than they were represented to be, and that the opinion of the witnesses was not proper evidence of the difference in value. This objection was properly overruled by the justice, because the defendant had previously proved that the horses were older than the plaintiff represented them to be; and because their opinion of the difference of value was competent evidence. The question put to the witness in *Lewis* v. *Trickey*, (20 *Barb.* 387,) bears no resemblance to the questions put to the witnesses in this case.

In my opinion the judgment of the county court should be reversed, and that of the justice affirmed.

Judgment accordingly.

[Clinton General Term, May 6, 1856. *C. L. Allen, James, Paige* and *Rosekrans*, Justices.]

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35 114
45 196
61 617
62 235
67 387
24h 555
35a 158

PERRY and FINEHOUT, overseers of the poor of the town of Saratoga Springs, *vs.* TYNEN.

In an action brought in a justice's court, to recover penalties for violations of the excise law, it is a sufficient indorsement of the summons if it states that such summons is issued "according to the provisions of title 9, part 1, chapter 20 of the statute of Excise and the regulation of taverns and groceries."

A justice of the peace has authority to allow a constable to amend his return to a summons. And the refusal of the defendant to appear, will not deprive the justice of this right.

The power of amendment does not depend upon the appearance of the defendant in the suit.

The provisions of the code, respecting amendments, are in addition to those in the revised statutes. They are not inconsistent with each other, and both remain in force.

Whether a service upon the defendant of a copy of the indorsement on the summons is necessary? *Quære.*

After two overseers of the poor have united in commencing an action, and in the employment of counsel to appear in their joint behalf, to prosecute it, one of them alone, without the consent or concurrence of the other, has no power to discontinue the suit.

The act of withdrawing such suit involves the exercise of judgment and discretion—in other words, is a judicial act—and it cannot be done without the conjoint act of both the plaintiffs, determined upon while they are conferring together.

Where power is delegated for a mere *private* purpose, all the persons (if more than one) upon whom the authority is conferred must unite and concur in its exercise. In cases of the delegation of a *public* authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—i. e. if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend.

If there are only two to whom a public authority is delegated, it necessarily follows that nothing can be done without the consent of both.

THIS was an action, commenced before a justice of the peace, by the plaintiffs, against the defendant, for the recovery of several penalties for violations of the 15th section of the title of the revised statutes in relation to excise, &c. (1 *R. S.* 680, § 15, 1*st ed.*; 17*th sec. in* 3*d ed.*) The suit was commenced by summons. The justice indorsed on the summons, at the time it was issued, the following: "According to the provisions

of title 9, part 1, chapter 20 of the statute of Excise and the regulation of taverns and groceries. John T. Carr, justice of the peace." The constable returned the summons, with a return indorsed, "that the same was personally served on the said Dennis Tynen, on the 5th of January, 1855, and a copy left with the defendant." On the return day of the summons the plaintiffs appeared by W. M. Searing, who testified to his authority to appear for them; and the defendant appeared specially by L. B. Pike, to make objections to the jurisdiction of the court, and made the following, viz: 1. That no sufficient summons was served on the defendant; 2. That the indorsement required by the statute was not made on the copy summons left with the defendant; 3. That no sufficient indorsement was made on the summons; 4. That the return was not sufficient to show the service of the summons; and 5. That the court had no jurisdiction of the person of the defendant. These objections were overruled by the court, and the defendant did not appear any further, in the cause. J. A. Shoudy then appeared for Finehout, one of the plaintiffs, and produced a writing, signed by Finehout alone, in which it was stated that, "It is stipulated that the plaintiffs do withdraw and discontinue the said suit. I do hereby authorize the justice to enter judgment of discontinuance." This was the only authority to appear for Finehout, produced by Shoudy. Shoudy moved that the cause be discontinued; which motion was opposed by the counsel for the plaintiffs, who objected to the reception of the paper produced by Shoudy. The justice denied the motion of Shoudy, and proceeded with the suit. The plaintiffs then proved several violations of the 15th section of the said title in relation to excise, &c. After the defendant had declined further to appear in the cause, the counsel for the plaintiffs moved that the constable amend his return indorsed on the summons; which motion was granted. The constable then amended his return so that the same read as follows: "Personally served, Jan'y 5, 1855, and copy of summons and indorsement left with def't." The justice rendered a judgment in favor of the plaintiffs, for

$100 damages, and $3.39 costs; which was affirmed by the county court, and the defendant appealed to this court.

W. A. Beach, for the appellant.

Searing & Putnam, for the respondents.

By the Court, PAIGE, J. The indorsement on the summons was a compliance with the 7th section of the article of the revised statutes in relation to actions for penalties and forfeitures. (2 *R. S.* 481, 1*st ed.*) This section only requires that a general reference to the statute which gives the action shall be indorsed. The reference in this case was to the title; which is not subdivided into articles. This was sufficient. (17 *Wend.* 87. 1 *R. S.* 687.)

The justice had authority to allow the constable to amend his return. Justices have the same powers, in respect to amendments, as courts of record. (11 *Wend.* 214, 215. 1 *Barb. S. C. R.* 555, 556. 12 *Wend.* 150. 15 *id.* 557. 2 *R. S.* 225, § 1. *Id.* 424, § 1, *and* 425, § 10. *Code*, § 173.) The provisions of the code, as to amendments, are in addition to those in the revised statutes. (3 *How. Pr. R.* 305. *Voorhies' Code*, 4*th ed. p.* 261.) They are not inconsistent with each other, and both remain in force. The refusal of the defendant to appear, after his objections to the jurisdiction of the justice had been overruled, did not deprive the latter of his power afterwards to allow the amendment of the constable's return. The power of amendment does not depend upon the appearance of the defendant in the suit. The revised statutes expressly allow amendments to be made at any time before judgment. Under the code they may be made after, as well as before, judgment. (*Code*, § 173. 2 *R. S.* 429, § 1.) The amended return of the justice, I think, shows that the constable, when he served the summons, delivered a copy of the indorsement, with a copy of the summons, to the defendant. The return of the constable is not traversable. If it is false, the defendant has his remedy against him in an action for a false return. (14 *John.* 481.) I

is questionable whether a service upon the defendant of a copy of the indorsement on the summons was necessary. (2 *R. S.* 481, § 7.)

Neither of the objections interposed by the defendant to the jurisdiction of the justice can be sustained. A sufficient summons was served on the defendant; the summons was properly served; the indorsement thereon was a compliance with the statute which directed it; a copy of it was served on the defendant, in connection with a copy of the summons; and the court had jurisdiction of the person of the defendant.

The only remaining question to be considered is, whether after both the plaintiffs had united in commencing the suit, and in the employment of counsel to appear in their joint behalf to prosecute it, one of them alone, without the consent or concurrence of the other, had power to discontinue the suit.

There is a distinction between a delegation of power for public, and for private purposes. Where the power is delegated for a mere private purpose, all the persons (if more than one) upon whom the authority is conferred must unite and concur in the exercise. In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—in other words, if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend. Where the act to be done is merely ministerial, a majority must concur and unite in the performance of the act, but they may act separately. (3 *Durn. & E.* 38, 40, 380. 3 *Comst.* 407. 6 *John.* 39, 40. 1 *Bos. & Pul.* 236. 9 *Wend.* 191. 21 *id.* 217. 7 *Cowen*, 529, 530. 2 *R. S.* 555, § 27.) The provision in the revised statutes declaring, generally, that the act may be performed by a majority, upon a meeting of all the persons or officers to whom the authority is confided, (2 *R. S.* 555, § 27,) does not abrogate the common law rule allowing public officers to

act separately in performing a ministerial act. The statutory provision is permissive in its character, and is merely an affirmance of the validity of the acts of the majority. If there are only two to whom a public authority is delegated, it necessarily follows that nothing can be done without the consent of both. (21 *Wend.* 182.) Where, however, one of two public officers assumes to do an act, exclusively ministerial, in the name of both, the consent of the other may in general be implied, under the presumption of law that the officer has done his duty by conferring with his associate and obtaining from him the requisite authority to do the act. (21 *Wend.* 183, 184. 3 *Hill*, 603. 3 *Comst.* 407.) In this case there can be no presumption that Perry, the associate of Finehout, consented to the discontinuance of the suit; as Finehout, in attempting to withdraw the suit, acted independently of Perry and entirely in his own name. The independent act of Finehout, in his own name, repels all idea of the concurrence of Perry in the discontinuance of the suit. One of the reasons assigned by Judge Cowen in *Downing* v. *Rugar*, (21 *Wend.* 184,) for presuming the consent of an overseer of the poor to the prosecution instituted by his associate, viz. that it was beneficial to the town, &c. does not apply to the present case; as here it is not apparent that the withdrawal of the suit in question would have been beneficial to the town represented by the plaintiffs. I am inclined to the opinion that the act of withdrawing the suit involved the exercise of judgment and discretion. It clearly called for the deliberation of the two overseers, and for their determination of the question whether the discontinuance of the suit would affect injuriously or beneficially the public morals, and the interests of the town they represented. If I am right in this opinion, then the withdrawal of the suit was a judicial act, and it could not be done without the conjoint act of both the plaintiffs, determined upon while they were conferring together. If the sale of mortgaged premises by commissioners under the United States Deposit Fund Act is a judicial act, as was held in *Powell* v. *Tuttle*, (3 *Comst.* 396,) the withdrawal of the suit in question certainly ought to be so considered.

In this case the commencement of the suit, and the employment of counsel to prosecute it, was the united act of both plaintiffs. This concurrence, and joint agency of theirs in commencing the suit, rebuts the presumption of the consent of Perry to its withdrawal by means of the independent act of Finehout in his own name. The cases of *The People* v. *The Commissioners of the Canal Fund*, (3 *Hill*, 599,) and of *Downing* v. *Rugar*, (21 *Wend.* 183,) are unlike the present case. In the former case the appeal by one canal commissioner was brought in the joint names of all the commissioners; and the board of canal commissioners had assigned to the acting commissioner who brought the appeal the special charge of the line on which the damages were appraised. Under these circumstances, the court decreed that a delegation of power to the acting canal commissioner to bring an appeal might be presumed; and held that the bringing an appeal was not such a judicial act as precluded a delegation of such power. (3 *Hill*, 603.) In *Downing* v. *Rugar*, the application of one overseer of the poor for the warrant was in the joint names of both overseers, and the act itself was held to be strictly ministerial; and the court, under these circumstances, presumed that the consent of the other overseer had been obtained; and that he had delegated his authority to his associate to apply for the warrant.

My conclusion is, that the justice decided correctly in denying the motion of Shoudy for the discontinuance of the suit. The judgment of the county court must be affirmed.

[Clinton General Term, May 6, 1856. *C. L. Allen*, *James*, *Rosekrans* and *Paige*, Justices.]

PATTISON *vs.* RICHARDS.

22 143
1L 62
24h 477
28a 462
74a 445
84a 279

In an action brought against the defendant to recover damages for diverting the water of a stream from the plaintiff's land, by cutting ditches on the defendant's land, above the plaintiff's lot, the defendant cannot set up as an equitable defense, the violation or non-performance by the plaintiff of an agreement between the parties, relative to the deepening of the channel of the stream through their respective lands, made four years prior to the alleged diversion of the water by the defendant; there being no connection between the agreement and the cause or subject of the action.

Neither can such agreement be set up as a counter claim, or set-off, or by way of recoupment of damages.

In an action for a tort, previous to the code of 1852, set-offs were not allowed; nor are set-offs in actions for torts now allowed as counter claims, under the 2d sub. of sec. 150 of the code of 1852.

Counter claims, under the code of 1852, embrace both set-offs and recoupments, as they were understood prior to that code.

THIS action was tried before Judge CADY, at the Warren circuit, in May, 1851. It was commenced on the 28th of July, 1849. The plaintiff, in his complaint, stated that the defendant had diverted the water of a stream or water course which had run and flowed for upwards of 25 years from the lands of the defendant, on to and through the lands of the plaintiff, by cutting ditches on each side of such stream on the land of said defendant, and above the plaintiff's lot; for which the plaintiff demanded judgment for the damages sustained by means of such diversion. The defendant denied any wrongful diversion of the water of such stream, and set up, by way of defense, an agreement between the plaintiff and defendant, by which they, for the purpose of draining a marsh on the lands of both plaintiff and defendant through which said stream ran, agreed to and with each other as follows: The defendant agreed to dig out the channel of said stream, three feet deep on his lot, to the plaintiff's line, and was to have the right to ditch and drain his portion of the said marsh by digging ditches along the sides of said stream, &c. And the plaintiff agreed to dig out the bed of such stream from his line, to the same depth, to a distance on his lot sufficient to carry off the water freely through the channel to be dug by the defendant; and the defendant alleged that

he dug out the channel across his lot, according to the agreement; but that the plaintiff neglected to continue the channel by digging out the bed of the stream on his land, and allowed the bed of the stream to become filled up, by reason whereof the waters of the stream were stopped from running off freely, and set back on to the defendants land and ran in ditches dug by the plaintiff and defendant, &c.

On the trial the plaintiff proved the diversion of the water of the stream from his lot by means of ditches dug by the defendant on his land, on each side of the stream, to a depth lower than the water naturally flowed in the channel of the stream. It was proved that the plaintiff relied upon this stream to supply his house, and the upper part of his farm, with water. The side ditches on the defendant's land, which diverted the water, were dug by the defendant in 1846. The defendant proved that in 1842, while he was digging out the channel of the stream, on his own land, to the depth of 3 feet, the plaintiff said to the defendant that if he would dig out the brook to the plaintiff's line, he (the plaintiff) would continue it across his lot; that the defendant accepted the proposition, and continued the excavation of the channel to the plaintiff's line. There was a conflict in the evidence whether, if the stream had been dug out to the depth of 3 feet across the plaintiff's lot, all the water which naturally ran in the stream would have passed over and across the plaintiff's land, notwithstanding the side ditches of the defendant. The judge charged the jury that the agreement proved by the defendant was no defense to the action; and that if they believed any water had been diverted for purposes other than those for which the water of a running stream may be lawfully diverted from its natural course, on the plaintiff's land, by the ditches of the defendant, they should find a verdict for the plaintiff. And he refused to charge the jury, that if the plaintiff had not fulfilled the agreement on his part, and that if he did not get his full supply of the water of the stream in consequence of such non-fulfillment by him, he could not recover. The jury found a verdict in favor of the plaintiff for $125 dam-

ages. Upon this verdict judgment was entered, and the defendant appealed to the general term of this court.

Geo. Richards, for the appellant.

W. A. Beach, for the respondent.

By the Court, PAIGE, J. I see no error in the charge of the judge who tried the cause. The agreement proved on the trial and claimed by the defendant to be an equitable defense to the plaintiff's action, was made in 1842. The acts of the defendant, viz. the digging of the ditches on his land, by means of which the water of the stream was diverted from the plaintiff's land, for which this action was brought, were done in 1846. The agreement proved has therefore no connection with, or relation to, the digging of the ditches, which caused the injury to the plaintiff. The variance between the agreement as proved and the one set up in the answer is essential and material. The answer having been put in under the code of 1849, it must be construed according to the rules of pleading established by that code. But if the code of 1852 applied, the agreement proved on the trial could not be set up as a counter claim, as it had no connection with or relation to the acts of the defendant of which the plaintiff complains. It is not embraced by the definition of a counter claim in the code of 1852. It is not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (*Code, sec.* 150, *sub.* 1. 10 *How. Pr. Rep.* 377, 381, 2.) The agreement could not have been set up by way of recoupment of damages. A defendant, previous to the code of 1852, could only claim a recoupment where his demand against the plaintiff arose out of the same contract or transaction which was the subject of the plaintiff's action. (3 *Hill*, 174.) Nor can the defendant claim damages for breach of the agreement, as a set-off, either under the revised statutes or the code as it stood previous to its amendment in 1852; as the plaintiff's action is for a tort. In such an action, previous

to the code of 1852, set-offs were not allowed; nor are set-offs in actions for torts now allowed as counter claims, under the second sub. of sec. 150 of the code of 1852. Counter claims, under the code of 1852, embrace both set-offs and recoupments as they were understood prior to that code. The answer in this case does not claim the benefit of the agreement either as a counter claim, as a set-off, or by way of recoupment. It sets it up only as an equitable defense to the plaintiff's action. It cannot be received as such, because it has no connection whatever with the cause or subject of the plaintiff's action. It having no connection with the tortious act of the defendant, of which the plaintiff complains, no principle of equity will justify the court in receiving it, either as a full or a partial defense to the plaintiff's cause of action. If the agreement is a valid agreement under the statute of frauds, and the plaintiff has violated his part of it, and the defendant has a remedy against him for such violation, he must seek that remedy in a separate suit. It cannot be accorded to him in this action. The diversion of the water of the stream from the plaintiff's land, by the defendant, in order to drain his own land, was not a lawful or reasonable use of his right to the usufruct of the water as it passed over his land. (10 *Barb.* 518. 2 *John. Ch.* 162. 10 *Wend.* 260. 17 *Barb.* 659. 17 *John.* 306.)

The judgment must be affirmed.

[Clinton General Term, May 6, 1856. *C. L. Allen, Paige, James,* and *Rosekrans,* Justices.]

Biglow *vs.* Sanders.

If a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account. The rule is the same whether the books are produced by the plaintiff or the defendant.

Where the evidence, on a trial before a justice of the peace, is not undisputed and not entirely free from doubt, the county court, on appeal, ought not to reverse the judgment of the justice, even if it should be conceded that it was against the weight of evidence.

The rule is, that it is only where the facts are undisputed, or the evidence is not conflicting and is free from reasonable doubt, that the judgment of the justice can be set aside upon the ground that such judgment, or the verdict of the jury on which it is founded, is against evidence.

The words "*errors of fact*," in the 366th section of the code, do not refer to an erroneous finding of the court or jury upon the evidence, but to those errors of fact which do not appear from the record or evidence, such as infancy, coverture, &c. of some of the parties.

APPEAL from the county court of Clinton county. The suit was commenced before a justice of the peace, who rendered a judgment in favor of the defendant for $1.25. This judgment was reversed by the county court, on appeal.

C. K. Averill, for the plaintiff.

Thos. Armstrong, for the defendant.

By the Court, Paige, J. The complaint was for goods, &c. sold and delivered. On the trial the plaintiff introduced his books of account in evidence; after proving that he kept correct books, &c. The account against the defendant in the books, contained two cash charges, and an item for the plaintiff's due-bill for goods. The defendant now objects that the books are not evidence of these charges. It seems he did not take this specific objection before the justice. He there only objected to the introduction of the books upon the ground that they had not been sufficiently proved. The defendant also claims, in addition to his credits in the account in the plaintiff's books, to be allowed for drawing the boards and plank testified

to by witnesses Ransom and Palister. I think it is apparent from the correspondence of the dates of the credits in the account with those testified to by Palister, that the drawing of the lumber credited to the defendant is the same as that referred to by Palister. It is evident that the defendant should not be allowed for both the drawing of the lumber sworn to by the witnesses Ransom and Palister, and that credited to him by the plaintiff.

If the defendant relies upon his credits in the plaintiff's account, he cannot object to the two cash charges and the charge for the plaintiff's due-bill charged in the account. The rule is, that if a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account; and the rule is the same whether the books are produced by the plaintiff or the defendant. This principle was affirmed as law in the case of *Low* v. *Payne*, decided by this court, at general term in the 4th district, in 1847 or 1848. (1 *Cow. & Hill's Notes*, 227, 8, 9. 1 *Wash. C. C. Rep.* 413. 15 *John.* 409. 5 *Taunt.* 245.) The case does not show whether the two witnesses, Ransom and Palister, testified to the drawing of the same or different lumber. I incline to the conclusion that they speak, in their testimony, of the same lumber. If my conclusions as to this part of the case, and also as to the identity of the lumber spoken of by Palister with that mentioned in the plaintiff's account, are correct, judgment should have been given by the justice in favor of the plaintiff. But as these questions are mere questions of fact, and as the evidence in regard thereto is not undisputed and not entirely free from doubt, I think that the county court ought not to have reversed the judgment of the justice, even if it should be conceded that it was against the weight of evidence. The rule seems to be, that it is only where the facts are undisputed or the evidence is not conflicting, and is free from reasonable doubt, that the judgment of the justice can be set aside upon the ground that it, or the verdict of the jury on which it is founded, is against evidence. (8 *How. Pr. Rep.* 377. 18

Barb. 347. 1 *Smith*, 72, 178. 2 *Sand.* 222. 12 *Barb.* 382. 1 *Smith*, 319.) In *Bennett* v. *Scutt*, (18 *Barb.* 347,) it was held by the general term in the 7th district, that the county court could not properly disturb the verdict of a jury in a justice's court, because it was against the weight of evidence. The words "*errors of fact*," in the 366th section of the code, do not refer to an erroneous finding of the court or jury upon the evidence, but to those errors of fact which do not appear from the record or evidence, such as infancy, coverture, &c. of some of the parties. (8 *How. Pr. Rep.* 377. 7 *id.* 64.) The code declares that the county court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. This is substantially the same language as that used in relation to the judgment of the common pleas, on the review of justices' judgments, in the revised statutes. (*Vol.* 2, *p.* 251, *sec.* 181.) Under this section of the revised statutes the rule adopted was, that if there was evidence on both sides, the judgment of the justice could not be reversed by the common pleas; not even where the verdict was against the weight of evidence; and that if, in such a case, the common pleas reverses the justice's judgment, its judgment would be reversed, on error. (21 *Wend.* 305. 18 *id.* 141, 4, 5, *in error.* 3 *Hill*, 75. 15 *Wend.* 490.)

In accordance with these authorities the judgment of the county court must be reversed, and that of the justice affirmed.

[Clinton General Term, May 6, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

Hodges *vs.* Hunt.

It results from the fact of an infant's contract not being binding upon him, unless it be for necessaries, that a new promise, made by him after he becomes of full age, must possess all the ingredients of a complete agreement, to enable the creditor to recover.

Hence, as no agreement is complete until the minds of the contracting parties meet, the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise creates a new contract; and the old debt supplies the consideration.

Most of the contracts of infants, not being binding upon them, a new promise does not impart to a contract any legal validity, so as to enable the creditor to enforce it; but the new promise creates a new contract, founded upon, and deriving its aliment from, the old demand, upon which the creditor may sustain a suit against the infant.

A reply not being admissible, in justices' courts, the allegation of new matter, in an answer, must in all cases necessarily be deemed controverted by the plaintiff; and it is competent for him to countervail it by evidence either in direct denial, or of new matter by way of avoidance.

Therefore, where, in an action commenced in a justice's court, the defendant puts in an answer setting up the defense of infancy, the plaintiff may, without replying, or amending his complaint, prove the making of a new promise by the defendant, after he became 21 years old.

HODGES, the plaintiff, sued the defendant Hunt before a justice of the peace on a promissory note signed by the defendant, for $19.50, dated April 26, 1854. The defendant put in an answer setting up the defense of infancy. There was no reply; and the plaintiff made no application to amend his complaint. On the trial the plaintiff proved the execution of the note, and the defendant proved that he was under 21 when he signed the note. The plaintiff then proved an absolute promise of the defendant, to pay the note, made after he became 21 years of age, to the attorney of the plaintiff, to whom the plaintiff had sent the note for collection. This evidence of a new promise was objected to, on the grounds, 1. That it was inadmissible under the pleadings; 2. That evidence of a new promise was inadmissible unless made directly to the plaintiff, or his agent. The justice rendered judgment in favor of the plaintiff; and on appeal the county court affirmed

the judgment of the justice. The defendant then appealed to this court.

Charles Rich, for the defendant.

W. H. Andrews, for the plaintiff.

By the Court, PAIGE J. The question in relation to the setting up of a new promise, made by an infant after he comes of age, in a reply to the defense of infancy, was fully discussed in the case of *Watkins* v. *Stevens*, (4 *Barb.* 168.) In that case the general term of the supreme court of this district came to the conclusion that the contract of an infant, unless for necessaries, could not become obligatory upon him, except by virtue of a new promise or ratification made by him after he became of age; that such new promise or ratification must be equivalent to a new contract; and that the suit against the infant could be sustained only on the contract created by the new promise or ratification; but that the rules of pleading admitted of the anomaly of allowing the plaintiff to declare on the original contract, which was not binding on the infant, and to reply specially the new promise made by him after he became of age, which was the only contract that could be enforced. (*See pages* 174, 175 *of that case, and the case cited.*) It results from the fact of the original contract not being binding on the infant, that the new promise must possess all the ingredients of a complete agreement, to enable the plaintiff to recover against the infant. Hence, as no agreement is complete until the minds of the contracting parties meet, the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise creates a new contract; and the old debt supplies the consideration. (4 *Barb.* 174, 175, 178. 11 *Wend.* 86. 3 *id.* 479. 2 *Hill*, 120.)

Although most of the contracts of infants are now held to be voidable and not absolutely void, yet as they are not binding on the infant, a new promise does not impart to them any legal validity so as to enable the creditor to enforce them; but the

new promise creates a new contract founded upon and deriving its aliment from the old demand, upon which the creditor may sustain a suit against the infant. (2 *Kent's Com.* 234. 1 *Metc.* 589. 3 *Wend.* 481. 2 *Hill*, 120. 17 *Wend.* 129, *&c.* 11 *id.* 85.) I think, therefore, that the language of Judge Welles in *Taft* v. *Sergeant*, (18 *Barb.* 323,) was not critically correct when he said that the note of the infant, in that case, stood revived and ratified by the new promise.

Although the complaint of the plaintiff in this action was founded on the original note, and not on the new promise, I nevertheless think that evidence of such new promise was admissible, under the pleadings. Under the old system of pleading the plaintiff could have declared on the original note, and have replied specially the new promise. Under the code of 1852, a plaintiff who founds his complaint on a contract made by an infant, cannot reply a new promise, to an answer setting up the defense of infancy; as under that code all replies except to new matter in an answer, constituting a counter claim, are abolished. (*Code*, §§ 153, 168.) But the code of 1852 makes provision for the want of a reply, by declaring that every allegation of new matter in the answer, not relating to a counter claim, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. (*Code*, § 168.) As a reply is not admissible in a justice's court, the allegation of new matter, in an answer, in those courts, must in all cases necessarily be deemed controverted by the plaintiff; and it must be competent for him to countervail it by evidence either in direct denial, or of new matter by way of avoidance. (*Code*, § 64.) This rule must be applied to the pleadings and evidence in a justice's court, not only from the necessity of the case, but also in analogy to a similar principle incorporated in the 168th section of the code. It seems, also, that section 168 is expressly made applicable to justices' courts by sec. 64, sub. 15. The case of *Esselstyn* v. *Weeks*, (2 *Kernan*, 635,) goes far to establish that the evidence of the new promise, in this case, was admissible under the pleadings. In that case the action was commenced under the code of 1848,

which required replies to new matter in the answer; and the defendant put in an answer setting up the statute of limitations, and the plaintiff replied, in accordance with the old system of pleading, generally, that the cause of action accrued within six years, &c.; and Ch. J. Gardiner, delivering the opinion of the court of appeals, held that although according to the modern decisions in this country, the statute of limitations interposed an absolute bar to the original demand, and did not merely create a presumption of payment; and that although the spirit of these decisions required that the action should be founded on the new promise, instead of the original debt, yet as the rule of pleading adopted in that case had long been acted on, and as substantial justice could be attained under either mode of pleading, the pleadings would be considered sufficient, notwithstanding the code. That decision is applicable to this case. The only difference between the cases is, that by the code of 1848, under which the action of *Esselstyn* v. *Weeks* was commenced, the plaintiff was allowed to reply to allegations of new matter in the answer, and the code of 1852, in force when this action was commenced, abolished replies in all cases, except where the answer sets up a counter claim; and declares that in all other cases where new matter not relating to a counter claim is alleged in the answer, it is to be deemed controverted by the plaintiff as upon a direct denial or avoidance, as the case may require. Under the operation of this new principle of pleading introduced by the code of 1852, in a case like the present, the allegation of infancy, in the answer, is to be deemed controverted, as upon an avoidance, by a reply of a new promise after the defendant became of age. The pleadings in this case are therefore to be construed under the present code precisely as, with the addition of a reply setting up a new promise, they would have been under the code of 1848. Such a construction of the code of 1852 was adopted by Justice Harris in *Simpson* v. *Loft*, (8 *How. Pr. Rep.* 234.) In that case he held that under that code, where a defendant sets up in his answer new matter not amounting to a counter claim, the plaintiff may prove new matter in avoidance, although not

alleged in his pleading. This rule of construction, as appears from what I have already said, is applicable to the provisions of the code in relation to justices' courts. I conclude, therefore, that the evidence of the new promise by the defendant was properly received by the justice, under the pleadings in the action. The new promise created a new contract. It was made directly to the plaintiff's agent; and was absolute and unqualified.

I see no error in the judgment of the justice; and the judgment of the county court, affirming that of the justice, must be also affirmed.

[Clinton General Term, May 6, 1856. *C. L. Allen, Paige, James* and *Rosekrans*, Justices.]

22 154
45 509
34h 177
36a 253
47a 175
80a 590

Wemple and others, assignees of Gardinier and Van Denburgh, *vs.* Stewart and others.

A written contract, in the absence of fraud, can only be reformed, where it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake.

To show that a written contract does not conform to the actual agreement made and intended to have been reduced to writing, the actual agreement should be stated, and the mistake in reducing it to writing alleged.

In an action for the non-delivery of goods agreed to be sold, if there is no evidence of their value at the place of delivery, evidence is admissible of their value at other places in the neighborhood of the place of delivery, and also at distant places where there is a market for the same articles, in connection with proof of the expense of transportation between such places and the place of delivery.

It is only where the evidence is clear and explicit, as to the value of the article at the place of delivery, that evidence of value at other places is inadmissible.

By a written agreement between the defendants and G. & V. the former sold and agreed to deliver to the latter 30,000 spruce plank "*sawed at our mill in S.*" *Held*, that the words "sawed at our mill," amounted to an affirmation by the defendants that that quantity had been sawed at their mill, and were then in their possession, owned by them. And that if the defendants had not on hand,

at the date of the contract, 30,000 plank, they were bound to saw a number equal to the deficiency, and deliver them according to their contract.

The defendants, in the same contract, also agreed to deliver to G. & V., in addition to the said 30,000 plank, all the merchantable plank, of the description and proportions therein mentioned, as they, the defendants, might saw at their mill the ensuing winter, to be delivered at the yard of G. & V. in F. the ensuing summer and winter, &c. *Held*, that the defendants did not, by this clause, obligate themselves to saw any spruce plank at their mill. That the obligation extended no further than to require them, in case they should elect to saw merchantable spruce plank at their mill, during the ensuing winter, to deliver all such plank, so sawed, at the yard of G. & V.

It was accordingly *held*, that it was erroneous to allow damages to the plaintiffs for the non-delivery of merchantable spruce plank of the description specified in the contract, not actually sawed at the mill of the defendants during the winter ensuing the date of the contract.

Where a party to a contract, after a breach by the other party has occurred, assigns his property to trustees, in trust for the benefit of creditors, the omission of the assignees to give notice to the other party, of the assignment, and to offer to fulfill the contract on the part of the assignor, will not discharge the other party from his obligation to fulfill the contract on his part.

THIS action was commenced in April, 1854, to recover damages for the non-performance of a contract made on the 20th of August, 1852, by the defendants, with Gardinier & Van Denburgh, in which the defendant sold and agreed to deliver to Gardinier & Van Denburgh, at their lumber yard in Fultonville, 30,000 merchantable spruce plank, sawed at their mill in Stratford, Fulton county, two-thirds at least of which to be 9 and ten inches wide, for which Gardinier & Van Denburgh were to pay the defendants on delivery, as follows: for all the ten inch plank, twelve cents each; for all nine inch plank, eleven cents each; and for the residue, one cent per inch in width; said plank to be thirteen feet long and to include all merchantable plank, &c. and to be delivered during the then ensuing winter and spring. The defendants, in this contract, also agreed to deliver to G. & V., in addition to the said 30,000 plank, all the merchantable plank of the description and proportions as above mentioned as they, the defendants, might saw at their mill the ensuing winter, to be delivered at the yard of G. & V., in Fultonville, the ensuing summer and winter of 1853 and 1854, at the respective prices above stated. It

was provided in said agreement, that if any of the nine and ten inch plank then at the mill should lack or exceed a quarter of an inch in the width, a proportionate deduction or allowance should be made thereon, but that all plank thereafter to be sawed should be sawed 9¼ and 10¼ inches wide, so as when delivered, they should be nine and ten inches wide. The complaint alleged a neglect and refusal by the defendants to perform the contract. It also alleged an assignment by Gardinier & Van Denburgh to the plaintiffs, dated Sept. 14, 1853, of all their estate, &c. in trust for the creditors of the assignors.

The defendants, in their answer, among other allegations, alleged that it was the intention of the parties to the contract to sell and purchase the plank which the defendants then had at their mill, to the number of 30,000, if they had so many, and if not, then it was the intention of the defendants to sell, and of Gardinier & Van Denburgh to purchase, the plank they then had sawed at the mill, and no more. And the defendants insisted that such contract should be so construed, and should be reformed in accordance with such intention. This allegation was not denied in the reply of the plaintiffs.

The action came on for trial at the Montgomery circuit, held in February, 1854, and was referred by Judge Allen to Henry Adams, Esq. On the trial, before the referee, the defendants moved that the contract be reformed as claimed in the answer; which motion was denied by the referee. It was admitted on the trial that the defendants delivered to Gardinier & Van Denburgh 759 plank before the 1st of June, 1853, and 2723 plank in the months of June and July, 1854; and that $74 dollars was paid by G. & V. to the defendants before the 1st of June, 1853. The plaintiff proved by one McElwain the price of spruce plank in the spring of 1853, and up to June 1, at Fonda, being less than one mile from Fultonville. This witness had previously stated that he did not know the price of plank at Fultonville; nor whether there was a market there. He also testified that he did not know of plank being sold nearer to Fultonville than Fonda. This testimony was objected to; the defendants insisting that the plaintiffs could only prove

the price at Fultonville, the place of delivery. The plaintiffs proved how many plank the defendants could have sawed at their mill during the winter ensuing the date of the contract. This evidence was also objected to. Another witness for the plaintiffs testified that he resided in West Troy; was a dealer in lumber, and was acquainted with the price of lumber at West Troy; that Troy was a large lumber market; and he testified to the prices at Fonda, by deducting from the wholesale prices at Troy a fair sum for freight, commissions, &c. He also testified that he had never bought or sold lumber at Fonda or Fultonville. This testimony was also objected to. The plaintiffs proved that plank at Fultonville was worth half a cent a piece more than at Fonda. Another witness testified that there was no difference in price between Fultonville and Fonda. The plaintiffs also proved the price of plank at Albany, and the freight from Fultonville to Albany. This evidence was also objected to. The defendants offered to prove that at the date of the contract they had only 15,000 plank sawed at their mill. This evidence was rejected; the referee deciding that the defendants were bound, by the contract, to deliver 30,000 plank, whether they had that number sawed or not. The referee decided that the defendants were bound to deliver the plank, under the contract, after the assignment by Gardinier & Van Denburgh to the plaintiffs, without previous notice from the assignees that they would receive the plank and fulfill the contract on the part of Gardinier & Van Denburgh. The referee allowed the plaintiffs damages as well for the non-delivery by the defendants of the whole of the 30,000 plank stipulated to be delivered, by the first clause of the contract, as for the non-delivery of the plank which they *might* have sawed during the winter of 1852 and 1853, as stipulated in the second clause of the contract.

H. & F. Fish, for the plaintiffs.

McMartin & Aikin, for the defendants.

By the Court, PAIGE, J. The defendants make the following points: 1. That the referee should have reformed the contract as claimed in the answer of the defendants; 2. That the referee erred in receiving evidence of the price of plank at any other place than the place of delivery; 3. That by the terms of the contract the defendants were not bound to saw and deliver any more plank than they pleased, during the winter ensuing the date of the contract; 4. That the terms of the contract only required the defendants to deliver the plank which had been previously sawed at their mill and was at such mill at the date of the contract; 5. That the defendants were not bound to deliver any plank to the assignees of Gardinier & Van Denburgh without notice of the assignment, and an offer on the part of the assignees to fulfill the contract; 6. That the damages allowed by the referee were more than the evidence and the contract warranted.

The statements in the answer show no right to demand a reformation of the contract, by conforming it to the alleged intention of the parties. A written contract, in the absence of fraud, can only be reformed, where it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake. (1 *Story's Eq. Jur. sec.* 152, 155, 156, 157. 2 *John. Ch.* 595, 596.) The answer, in setting up the mistake in the written contract, should have stated that the parties agreed to sell and purchase only the plank which the defendants then had at their mill, and then should have alleged that in reducing the contract to writing this limitation of the quantity sold and purchased was accidentally omitted, contrary to the intention of the parties: merely alleging that the parties intended to sell and purchase the plank then at the mill of the defendants, is not sufficient to entitle the defendants to a reformation of the contract in accordance with that intention. To show that a written contract does not conform to the actual agreement made and intended to have been reduced to writing,

the actual agreement should be stated, and the mistake in reducing it to writing alleged. (3 *How. Pr. Rep.* 358.) I am inclined to believe that if the mistake in the written contract, and the claim to have it reformed, had been properly stated, it would have been a counter claim within the meaning of the first sub. of sec. 150 of the code. A counter claim is there defined to be, "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The counter claim attempted to be set up by the defendants is a cause of action arising out of the contract set forth in the complaint as the foundation of the plaintiffs' claim, and is connected with the subject of the action. (*Voorhies' Code*, 208, 209, *4th ed.*) If the counter claim had been properly set up, a reply would have been necessary. (*Code, sec.* 168. 3 *How.* 358.)

The evidence in relation to the price of spruce plank at Fonda, Troy and Albany, was properly received. There was no evidence of the value of the plank at Fultonville, the place of delivery; at least, none had been introduced at the time the evidence as to its value at the other places was received. Where there is no evidence of the value of the goods at the place of delivery, evidence is admissible of their value at other places in the neighborhood of the place of delivery, and also at distant places where there is a market for the same articles, in connection with proof of the expense of transportation between such places and the place of delivery. (5 *Denio*, 56. 8 *Wend.* 435. 7 *Barb.* 18.) It is only where the evidence is clear and explicit as to the value of the article at the place of delivery, that evidence of value at other places is inadmissible. (8 *Wend.* 436.)

I think the construction put upon the first clause of the contract, by the referee, was correct. By its terms the defendants sold and agreed to deliver to Gardinier & Van Denburgh 30,000 merchantable spruce plank. The words "sawed at our mill" amount to an affirmation by the defendants that that quantity had been sawed at their mill, and were then in their possession, owned by them. The agreement of the defendants to sell and deliver 30,000 plank assumes that they have sawed that number

of plank and have them on hand, and that they have it in their power to deliver them according to the agreement. If the words "sawed at our mill" should be construed to refer to plank thereafter to be sawed, they would create an obligation on the defendants to saw the quantity stipulated, and to deliver them, as provided in the contract. This construction is confirmed by the second clause of the contract, in which the defendants agree to deliver to Gardinier & Van Denburgh, "*in addition to the above* 30,000, all the merchantable plank, &c. that we may saw," &c. Here they again assume, and impliedly assert, that they are obligated by the first clause of the contract to deliver to Gardinier & Van Denburgh 30,000 plank. If then the defendants had not on hand, at the date of the contract, 30,000 plank, they were bound to saw a number equal to the deficiency, and deliver them according to their contract.

But I think that the referee erred in his construction of the second clause of the contract. It seems to me that by that clause the defendants did not obligate themselves to saw at their mill any spruce plank. The obligation extended no further than to require them, in case they elected to saw merchantable spruce plank at their mill during the ensuing winter, to deliver all such plank so sawed, at the yard of Gardinier & Van Denburgh. The agreement is to deliver all the merchantable spruce plank *that they may saw*, &c. These words are not promissory in their nature, except so far as relates to the delivery of plank which they shall saw during the ensuing winter; nor do they import a promise or undertaking to saw any particular, or any, quantity of merchantable spruce plank during the ensuing winter. To construe this clause of the contract as requiring the defendants to saw all the plank they should be able to saw the next winter, &c. would be making a new contract for the parties.

If this construction of the second clause of the contract is correct, the referee erred in allowing damages to the plaintiffs for the non-delivery of merchantable spruce plank of the description specified in the contract, not actually sawed at the mill of the defendants during the winter ensuing the date of

the contract. The breach of the first clause of the contract was complete before the assignment of Gardinier & Van Denburgh to the plaintiffs. The 30,000 plank were, by the contract, to be delivered during the winter of 1852 and 1853 and the spring of 1853; and the assignment was not executed until the 14th of September, 1853. But if the assignment had been delivered before the breach was complete, the omission of the assignees to give notice of the assignment and to offer to fulfill the contract on the part of Gardinier & Van Denburgh, did not discharge the defendants from their obligation to fulfill the contract, on their part.

The judgment entered upon the report of the referee must be reversed, and his report set aside, and the action must be referred back to him to be retried.

[Clinton General Term, May 6, 1856. *C. L. Allen, James, Rosekrans* and *Paige*, Justices.]

Harrington and wife *vs.* Slade and others.

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36 382
41 56
51 628
53 531
67 425
3L 170
1h 300
4h 381
118a 134
118a 138

Amendments are now granted with greater liberality than formerly. Under the provisions of the revised statutes and the code, whenever the court can see that justice would be furthered by an amendment of the pleadings and proceedings in an action, it should grant the amendment, if asked for, upon terms just to the opposite party.

It is in all cases proper, however, in order to prevent negligence and laxity in pleading, to require from the party asking the amendment some reasonable excuse for the defect in his pleading, which he seeks to correct.

An order allowing a defendant to put in a supplemental answer, setting up a new defense, which, if established, will be fatal to the plaintiff's action, involves the merits, or at least affects a substantial right, and is therefore appealable.

Where C. purchased mortgaged premises from B. the mortgagor, in 1816, subject to the lien of the mortgage, and expressly agreed to pay the mortgage: *Held* that this agreement was a recognition of the mortgage; and that as twenty years had not elapsed, since such recognition, before the commencement of a suit to foreclose the mortgage, which was in 1832, payment of the mortgage could not be presumed.

And S. having purchased the mortgaged premises *pendente lite*, from two of the

defendants in the foreclosure suit, and claiming under C., *Held* that he was bound by the admissions and acknowledgments made by C. while owner of the premises; that the plaintiff had the right to make him a party to the suit by supplemental bill; and he having been thus made a party, it was *further held* that he was to all intents and purposes a party to the original suit, and had no right to claim that the foreclosure suit was not commenced, as against him, until the filing of the supplemental bill.

The voluntary alienation of property, pending a suit, by a defendant therein, is not permitted to affect the rights of the other parties to the suit.

A *lis pendens* is constructive notice to a purchaser from the defendant, and he, and his interest, will be bound by the decree entered in the suit.

Where the plaintiff makes a purchaser pendente lite a party to the suit, the latter is bound by the previous proceedings in the suit; and he comes before the court in the same plight and condition as the former party, and is bound by his acts, and may be subject to the costs of the proceedings, from the beginning.

THIS was an appeal from an order made by Justice C. L. ALLEN, at a special term, granting leave to the defendant Slade to put in a supplemental, or a new answer, to the bill. The suit was commenced in April, 1832, in the late court of chancery, to foreclose a mortgage given by Jacob Becker, on the 20th of August, 1803, on premises now owned by Slade. Becker and the other owners of the mortgaged premises were made parties to the suit. The defendant Slade purchased the premises, pendente lite, from Jesse Anthony and James Wallis, two of the defendants in that suit, and took a warranty deed thereof, on the 11th of March, 1834. On the 6th of February, 1847, Slade was made a party to the foreclosure suit, by a supplemental bill filed on that day; and on the 5th of June, 1847, he put in an answer to such supplemental bill. In his answer he admitted the filing of the original bill in April, 1832, and set up that John Crary, in February, 1816, became the purchaser of the mortgaged premises from the mortgagor, Jacob Becker, and entered into a written agreement with Becker, to convey the premises to Jeremiah Gifford, and out of the proceeds of the sale to pay off all liens on the premises; that said Crary, on the 1st of March, 1816, conveyed the premises to Jeremiah Gifford, with warranty, and in the deed of conveyance guarantied a perfect title to Gifford; that Jesse Anthony

and James Wallace, on the 19th of March, 1834, who claimed title under Gifford, sold and conveyed the mortgaged premises to him (the defendant Slade.) Slade in his answer denied notice of said mortgage and of the pendency of said suit, when he purchased; and insisted that Crary was bound to pay off said mortgage. In his supplemental answer he set up that he had been informed that since the putting in of his former answer, no payment had been made on said mortgage since 1806; that neither Gifford nor any subsequent owner ever agreed to pay such mortgage; that such mortgage was paid prior to the purchase of the mortgaged premises by him (Slade,) &c.; that Ann McKinney, the widow of the mortgagee, had the lawful control of such mortgage, and assigned the same to Crary in 1819: that Gifford and all claiming under him, including this defendant, since 1816, held said premises as having an absolute title therein; that said mortgage was not a lien on the premises; and that at the delivery of his deed to him, and at the time of his paying the purchase money, he had no notice of the existence of the mortgage.

C. Stevens, for the plaintiffs.

D. Gardner, for the defendant Slade.

By the Court, PAIGE, J. The defendant Slade does not, in his supplemental answer, state that he was ignorant of the new facts set up therein, at the time of the putting in of his original answer, or that, if known to him at that time, they were omitted by mistake or inadvertence; nor does he state any other sufficient reason for the omission. He merely states the new facts upon information received since the putting in of his original answer. This may be strictly true, and yet he may have had full knowledge of such facts when he put in such answer. (1 *Barb. Ch. Pr.* 165, 6. 4 *John.* 375, 6.) Under the old chancery practice, amendments of answers, and leave to put in supplemental answers, were granted with great caution. (4 *John.* 376.) The defendant was not allowed to file a supple-

mental answer contradicting the statements in the first answer or to set up as a new defense, usury or the statute of limitations, or any other defense denominated unconscionable; especially when these defenses were not intended to be presented in the original answer. (1 *Barb. Ch.* 167. 4 *Sim.* 61. 3 *Wend.* 573. 6 *Cowen*, 606. 7 *How. Pr. Rep.* 234. 1 *Duer*, 253.) But amendments are now granted with more liberality. Under the provisions of the revised statutes and the code, it is the duty of the court to allow amendments in furtherance of justice, upon such terms as shall be just and proper. (*Code*, § 173. 2 *R. S.* 424, § 1.) Whenever, therefore, the court can now see that justice would be furthered by an amendment of the pleadings and proceedings in an action, it should grant the amendment, if asked for, upon terms just to the opposite party. It is in all cases proper, however, in order to prevent negligence and laxity in pleading, to require from the party asking the amendment some reasonable excuse for the defect in his pleading, which he seeks to correct. The court of appeals have decided that in the exercise of the duty of the court to grant amendments, no discrimination should be made between the defenses sought to be set up by the amendment.

I think that the order appealed from in this case is an appealable order. It clearly involves the merits, or at least affects a substantial right. (*Code*, § 349, *subd.* 3. 10 *How. Pr. Rep.* 253. 4 *id.* 313. 8 *id.* 195. 7 *id.* 297.) A question whether a defendant should be allowed to set up a new defense which, if established, would be fatal to the plaintiff's action, must certainly affect a substantial right—the right of the plaintiff to recover upon the previous answer of the defendant. An order striking out portions of a pleading, if the portion stricken out may affect the rights of the party, has been held to be an appealable order (4 *How. Pr. Rep.* 313. 8 *id.* 195.) If that is an appealable order, then an order allowing a party to introduce into his pleading new matter which affects the rights of his adversary, must also be appealable.

In this case the defendant Slade asks to be allowed to set up by way of a supplemental answer substantially the defense of

payment of the bond and mortgage in question, founded upon the presumption of payment arising from the lapse of twenty years from the time the right of action accrued on the bond and mortgage. In his supplemental answer he denies any payment on the bond and mortgage by the mortgagor or any person in possession of the mortgaged premises, since 1806, and alleges that neither Gifford, to whom Crary conveyed in March, 1816, nor any subsequent owner, ever agreed since that time to pay such bond and mortgage. If John Crary, as is stated in the opposing affidavits, purchased the mortgaged premises from John Becker, the mortgagor, in February, 1816, subject to the lien of the mortgage in question, and then expressly agreed to pay the mortgage, payment of the mortgage cannot be presumed; as the agreement of Crary was a recognition of the mortgage, and twenty years did not elapse after such recognition before the commencement of this suit; which, it seems, was in April, 1832. The defendant Slade, claiming under Crary, is bound by the admissions and acknowledgments made by Crary while owner of the mortgaged premises; and he has no right to claim that the foreclosure suit was not commenced, as against him, until the filing of the supplemental bill making him a party to the original suit. He purchased *pendente lite* from two of the defendants in that suit, and being a purchaser subsequent to the commencement of the original suit, the plaintiff had the right to make him a party thereto by supplemental bill. He is, therefore, to all intents and purposes, a party to the original suit, and the time which has elapsed since that suit was commenced cannot form any part of the time since the recognition of the mortgage by Crary as a valid subsisting mortgage, upon which it is sought to raise a presumption of payment. If this state of facts should appear on the trial, the defense set up in the supplemental answer, of presumption of payment, arising from the lapse of time, must fail. The case of *Park* v. *Peck*, (1 *Paige*, 477,) and in those in 7 *Paige*, 465; 4 *Cowen*, 587; 1 *Hill*, 612; 4 *John.* 230; 6 *Paige*, 323; 1 *Watts*, 154, 525; 12 *Barb.* 585, and 10 *Paige*, 170, show

that the defendant Slade is bound by the acknowledgments of Crary.

The voluntary alienation of property pending a suit, by a defendant therein, is not permitted to affect the rights of the other parties to the suit. (2 *John.* 441, 445. 1 *id.* 506. *Mit. Pl.* 73.) A lis pendens is constructive notice to a purchaser from the defendant, and he and his interest will be bound by the decree entered in the suit. The act requiring the filing of notice of lis pendens, in suits for the foreclosure of mortgages, was not passed until 1840, after the commencement of this suit. (1 *John.* 505. 9 *Paige*, 512, 516. *Mit. Pl.* 73. 1 *Paige*, 483. 2 *Barb. Ch.* 151.) The plaintiff in a suit is not bound to make a purchaser pendente lite from the defendant a party to the suit; although he may do so if he deems it essential to the relief to which he may be entitled against such purchaser. (7 *Paige*, 291.) The plaintiff can proceed in the suit without noticing the alienation, and the decree he obtains will bind the purchaser. (5 *John.* 93.) If the plaintiff makes the purchaser a party, the alienee is bound by the previous proceedings in the suit before he was made a party; and he comes before the court in the same plight and condition as the former party, and is bound by his acts, and may be subject to the costs of the proceedings from the beginning of the suit. (*Mit. Pl.* 68, 74. 1 *Atk.* 89. 6 *Mad.* 59. 2 *Bligh, P. C.* 593, *note.* 2 *Atk.* 174.) A supplemental bill is a mere continuation of the original suit by or against a party having or acquiring the interest of a former party; and it forms, together with the original bill and the proceedings under it, but one record. (2 *Barb. Ch. Pr.* 84, 85. *Mit. Pl.* 64.) It is apparent, therefore, from the answer and supplemental answer of the defendant Slade, and the affidavits read in opposition to the motion for leave to put in a supplemental answer, that the defense set up in such supplemental answer cannot be sustained. But inasmuch as the defendant Slade has alleged in his supplemental answer, duly verified, on information and belief, that the mortgage was paid and satisfied prior to March 17, 1834; and that it is not a lien on the mortgaged premises, I am disposed to give him

an opportunity to establish those allegations, if he can do so, on the trial. Although I have no hesitation in saying that the opportunity thus afforded him will be fruitless, if the allegation of payment and that the mortgage is not a lien are mere conclusions of law, deduced by him from the lapse of time since a payment on the mortgage or an acknowledgment of its existence as a valid security by a former owner of the premises.

Under the circumstances, I am inclined to affirm the order of the special term without costs.

Judgment accordingly.

[Clinton General Term, May 6, 1856. *C. L. Allen, James, Rosekrans* and *Paige*, Justices.]

Lefevre and wife *vs.* Laraway and others.

22 167
62 291
1h 384
35h 577
81a 114

The section of the title of the revised statutes relative to executions, &c. which provides that the omission of the sheriff to give notice of sale under an execution shall not affect the validity of any sale made to a purchaser in good faith without notice of any such omission, applies to sales under a judgment in partition.

All the provisions of the title in relation to the notice of sales by sheriffs on execution, are made applicable to sales of lands under a judgment in partition.

The provision that the notice of sale of lands, in partition, shall be for the same time, and in the same manner, as is required on sales by sheriffs on execution, necessarily implies that in every case where an omission to give notice of sale, or an irregular notice, will not invalidate a sale by a sheriff on execution, a like omission to give notice of sale, or a like irregular notice, will not affect the validity of a sale of lands in partition.

The provisions in the title of the statute relative to the partition of lands, which declare that conveyances by commissioners, or a master in chancery, shall be a bar, both in law and equity, against all persons interested in the premises, who are parties to the proceedings, will also cure any defect or irregularity in the notice of sale

The English practice, of opening biddings and ordering a resale, before the confirmation of the sale, upon an offer being made of an advance of 10 per cent and an indemnity to the purchaser, has not been adopted in this state. Here, neither before nor after the confirmation of the report of the sale, will a resale be ordered, upon an offer of an increase of price, alone.

In this state, special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale.

A resale will be ordered where there has been fraud, or misconduct, in the purchaser; fraudulent negligence or misconduct in any other person connected with the sale; or surprise or misapprehension, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale.

Infant owners will be relieved, by a resale, where their property has been sacrificed at the sale, through the misapprehension or negligence of their natural or statutory guardians, on condition that a full indemnity is offered to the purchaser.

Whenever, in a suit or proceeding in the supreme court, the fact appears, that the rights of infant parties have been invaded, or are in danger of being prejudiced, the court ought, without waiting to be specially invoked to do so, to exercise its protective jurisdiction in behalf of such infant parties.

Although no application for a resale is made in behalf of infants, yet such an order may be made on the court's own motion, in its capacity of universal guardian to all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property.

A purchase by the guardian ad litem of infant parties to a partition suit, of lands sought to be partitioned in such suit, at a sale thereof by a referee, which purchase is not made for the benefit, or in behalf, of such infants, is void.

And it matters not that the purchase was not made by the guardian for his own benefit, but as agent for other persons. The guardian owes a duty to his wards, which renders it improper for him to act in behalf of others.

Where the fact of a purchase by a guardian, for the benefit of third persons, at a price injurious to the interests of the infant defendants, has, by a motion of the plaintiff for a resale, been brought to the knowledge of the court, it is the duty of the court, without waiting for an application to be made in behalf of the infants, to order a resale of the property, for their benefit.

MOTION by the plaintiff for a resale of premises sold under a judgment in partition. The lands sought to be partitioned were situated (being several distinct parcels, and embracing a tannery,) in the counties of Fulton and Hamilton. They belonged to the plaintiffs and the defendant Laraway, and to the widow and heirs of Isaac Van Valkenburgh, deceased. The heirs of Isaac Van Valkenburgh were infants, and appeared in the action by William Wait, their guardian ad litem. The lands and tannery were sold to several purchasers, on the 16th of April, 1856, by Elisha Bentley, the sheriff of the county of Fulton, who was appointed referee to make such sale. At the sale, the tannery and land (being 50 or 60 acres) immedi

ately connected therewith, were bid off by Mr. Wait for William A. Smith and Patrick Croe, for the sum of $7000. The other parcels of land were severally bid off by Joseph Horsfall for William I. Powell & Co., and by Caleb W. Slocum, David Arnold, Jacob Van Housen, and the plaintiff, Isaac Lefevre. All the lands, other than the tannery and land connected therewith, sold for $2870. The sale was advertised for the 11th of March, and was postponed to the 16th of April, 1856. The plaintiff, in his affidavit, stated that on the day of the sale he was very ill, and in a high state of nervous excitement, and not in a condition to do business; that he had previously intended to bid for the tannery and the land connected with it, at least $9000; that one half of the property sold belonged to him; that the value of the whole of the property sold was at least $12,000; and the plaintiff, in his affidavit, offered to give that sum for it, and to give security for the payment of that sum, or to pay the money into court. The plaintiff also stated in his affidavit, that had he been in his usual health he should have bid the sum of $12,000 for the whole of the property. The plaintiff offered, in case of a resale, to pay all reasonable costs, expenses and damages, if any should occur to the purchasers in consequence of such resale. No part of the purchase money had been paid by the purchasers, and no report had been made of the sale. Several witnesses, one of whom was a physician, testified to the plaintiff's ill health on the day of sale; and also that the tannery and property connected with it was worth $9000 or $10,000. Several affidavits were read on the part of the purchasers of the tannery; which stated that the plaintiff did not appear to be ill, or in a state of nervous excitement, at the sal Some of the notices of postponement of the sale, posted in th towns where the lands were situated, were unaccompanied by the original notices of sale. The terms of sale required the payment of half of the purchase money on delivery of the deed, and the residue in six months. There were about 2000 cords of bark at the tannery, belonging to the plaintiff Laraway, and the widow and heirs of Isaac Van Valkenburgh. Previous to the sale, at a meeting of the purchasers of the tannery, (Smith

& Croe,) Laraway, Isaac L. Van Valkenburgh, Elizabeth Van Valkenburgh and William Wait, it was understood between them that Wait might bid for the tannery, for Smith & Croe, the sum of $8000, and if that property went higher Croe should do the bidding; that if such property was purchased by Smith & Croe for a sum less than $8000, they should have the property for the bid. It was also proved by two witnesses that Smith declared, after the sale, that if they (Smith & Croe) had purchased the tannery for a sum above $6000, they were to pay only one half of the excess above that sum. It was denied in the affidavits of Smith, Croe and Elizabeth Van Valkenburgh, that this provision formed any part of the agreement. Smith & Croe offered to pay, if they kept the tannery, $2.75 a cord for the bark at the tannery. After the sale Smith & Croe provided $3800 for the first payment on the purchase. Smith swore that he understood the referee to say, on the day of the sale, that Smith & Croe might take immediate possession, and that the deed would be delivered in about one month; and that in view of this they had made a contract for the furnishing to them, to be tanned, of 10,000 hides, and had by this motion been delayed in the performance of such contract, and that they had effected an insurance on the property, and paid a premium of $61, and had repaired the fences and taken charge of the tannery

A memorandum of the sale was signed by the referee and Wait. It was agreed on the hearing, between the parties, that this motion should not embrace the purchase by William I. Powell & Co.; and that the decision should not be deemed to affect such purchase.

A. J. Parker, for the plaintiff Lefevre.

L. Tremain, for Smith & Croe, &c.

Paige, J. The counsel for the plaintiff makes the following points: 1. The proceedings on the sale were irregular; 2. There was a combination between the purchasers and the other parties to the suit to prevent bidding; 3. There was a corrupt agree-

ment between them, that the purchasers should have one half of their bid over $8000; 4. The sale of the tannery was void, because the purchase was made by the guardian ad litem of the infant defendants, for the benefit of Smith & Croe; 5. The plaintiff's illness, with the inadequacy of the price, is a sufficient reason for a resale.

The irregularity in the proceedings in respect to the sale complained of, relates principally to the advertisement of the sale, and to the notices of the postponement of such sale. I am inclined to believe that the Fulton County Democrat was a newspaper of the county of Fulton, within the meaning of the revised statutes, (2 *R. S.* 369,) although the press work of the new matter, and the striking off of the paper, was done in the county of Schenectady. But, however this may be, the notice of the sale was regularly printed and published in another newspaper, which was both printed and published in the county of Fulton; in which county the tannery in question was situated. The notices of postponement were also published in the same papers. The same objection is made to the publication in the Hamilton County Sentinel, as to the publication in the Fulton County Democrat. A part of the lands sold lie in the county of Hamilton. But I think it unnecessary to dispose of the questions presented in relation to the regularity of the notices of the sale and of its postponement. The plaintiff, Lefevre, is not at liberty to take any objection founded on irregularity in the publication and posting of these notices, or on the omission of the referee to give such notices. The title of the revised statutes in relation to executions, &c. (2 *R. S.* 370, § 40,) provides that the omission of the sheriff to give notice of sale under an execution shall not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission. I think that this section should apply to sales under a judgment in partition. Section 56 of the title in relation to the partition of lands, requires that the notice of sale shall be for the same time and in the same manner as is required on sales of real estate by sheriffs on execution. (2 *R. S.* 326.) It is apparent from this section, taken in connection with the other

sections of that title, that all the provisions of the title in relation to the notice of sales by sheriffs on execution, are made applicable to sales of lands under a judgment in partition. (*See* §§ 61, 79, 80, 81, 2 *R. S.* 426, 330.) If this be a correct conclusion, then, if the referee in this case had omitted altogether to give a notice of sale, the sale to the purchasers would not have been invalid; if made in good faith without notice of any such omission. If an entire omission to give notice of the sale would not invalidate the sale, certainly a defective and irregular notice could not have this effect. There is no evidence in the case showing that any of the purchasers had notice of any irregularity in the notice of sale, or of any omission of the referee to give such notice, or to give notice of its postponement. The provision that the notice of sale of lands, in partition, shall be for the same time and in the same manner as is required on sales by sheriffs on execution, necessarily implies that in every case where an omission to give notice of sale, or an irregular notice, will not invalidate a sale by a sheriff on execution, a like omission to give notice of sale, or a like irregular notice, will not affect the validity of a sale of lands in partition. It seems also that the provisions in the title relative to the partition of lands, in respect to conveyances by commissioners, or a master in chancery, will cure any defect or irregularity in the notice of sale. These provisions declare that such conveyances shall be a bar, both in law and equity, against all persons interested in the premises, who are parties to the proceedings. There is also force in the proposition, that the plaintiff, from his connection with the proceedings, his agency in the publication of the notice of sale, and in the publication and posting of the notices of postponement, his bidding at the sale, and his participation in fixing the terms of sale, ought not to be permitted now to object to the validity of the sales, on the ground of irregularity in the notice of the sale, or in the notice of its postponement. The affidavits do not sustain the allegations of a combination to prevent bidding, and of an agreement that Smith & Croe should be entitled to one half of any bid made by them, above $8000.

The remaining points of the plaintiff, to be considered, are: that the sale of the tannery is void, because the purchase was made by the guardian ad litem of the infant owners; and that the illness of the plaintiff, Isaac Lefevre, on the day of the sale, in connection with the inadequacy of the price for which the tannery, &c. was sold, are a sufficient reason for ordering a resale.

Under the practice of the English court of chancery, as a general rule, the biddings will be opened, and a resale ordered, where, before the confirmation of the sale, an offer is made of an advance of 10 per cent on the bid and an indemnity to the purchaser. (1 *Sim. & Stu.* 20. 13 *Wend.* 226.) But a resale will not be ordered where the advance offered is less than 40*l.* (4 *Mad. Ch. Rep.* 460. 2 *Paige*, 100.) The English practice, however, has not been adopted in this state. Here, neither before nor after the confirmation of the report of the sale, will a resale be ordered, upon an offer of an increase of price, alone. (13 *Wend.* 226. 26 *id.* 143. 9 *Paige*, 259. 10 *id.* 244.) This rule also prevails in England, after the report of the sale is confirmed. In this state, special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale. A resale will be ordered where there has been fraud, or misconduct, in the purchaser; fraudulent negligence or misconduct in any other person connected with the sale; surprise or misapprehension, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. (13 *Wend.* 227. 26 *id.* 143. 10 *Paige*, 243. 3 *John. Ch.* 296. *White* v. *Wilson*, 14 *Ves.* 151. *Morice* v. *Bishop of Durham*, 11 *Ves.* 57.) In *Lansing* v. *McPherson*, (3 *John. Ch.* 424,) Chancellor Kent opened a sale, on the ground of the ignorance of the defendant, that the plaintiff had obtained a decree against him for the deficiency of the money to arise from the sale of mortgaged premises, to pay the mortgage debt, in connection with the defendant's offer of an advance of 50 per cent on the previous bid. In that case the plaintiff was the purchaser, and the sale had not been confirmed, nor the deed executed. In *May* v. *May*, (11 *Paige*, 201,) an irregular

sale of mortgaged premises, whereby the property was sacrificed to the prejudice of a judgment creditor, was set aside on the application of such creditor, and a resale ordered, and the purchaser was denied the costs of opposing the application for a resale. In *The American Insurance Co.* v. *Oakley*, (9 *Paige*, 259,) a resale was ordered where the master improperly put up for sale several lots together, which should have been sold separately, whereby a judgment creditor had been injured. But in this case, as the purchaser purchased in good faith, his costs, expenses and damages were directed to be paid. In *Brown* v. *Frost*, (10 *Paige*, 244,) it was held that a resale would be ordered on the application of an owner of the equity of redemption, where he had intended to bid a greater sum for the mortgaged premises than the price for which they were struck off, but was prevented from so doing by mistake or accident. In *Billington* v. *Forbes*, (10 *Paige*, 487,) the sale was opened on the application of a mortgagor, where an unconscientious advantage had been taken of his illness, by a co-defendant, which prevented him from attending the sale, and such co-defendant had, at the sale, purchased the premises at less than one third of their value. Infant owners will be relieved, by a resale, where their property has been sacrificed at the sale, through the misapprehension or negligence of their natural or statutory guardians, on condition that a full indemnity is offered to the purchaser. Relief is accorded to infants, on account of their infancy, where it would be denied to adults. A sale of the property of adults will not be disturbed when it has been sacrificed in consequence of their own negligence or inattention. (*Duncan* v. *Dodd*, 2 *Paige*, 101.)

If the plaintiff in this case was, at the time of the sale, laboring under such a high nervous excitement as to unfit him for business, and if he had previously intended to bid for the tannery and premises connected with it, the sum of $9000, and had been actually prevented from so doing, by his illness at the time of the sale, he would have been entitled to a resale on offering an advance of $2000 on the former bid, and full indemnity to the purchasers. But it is unnecessary to consider

whether he is entitled to a resale upon this ground; as I have come to the conclusion that a resale must be ordered upon other grounds. The circumstances in the case, of the infancy of some of the owners of the tannery, and that the tannery, &c. sold for a sum greatly below its value; in connection with the omission of the guardian ad litem of such owners to bid for Smith & Croe at least the sum of $8000, which he was authorized by them to do, and the offer of Lefevre of an advance of $2000 on the former bid, alone will justify me in ordering a resale, for the benefit of such infant owners. Although no application for a resale is made to the court in their behalf, yet such an order can be made on the court's own motion, in its capacity of universal guardian to all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property. (2 *Story's Eq. Jur.* §§ 1334, 1337.) Wherever, therefore, in a suit or proceeding in this court, the fact appears that the rights of infant parties have been invaded, or are in danger of being prejudiced, the court ought, without waiting to be specially invoked to do so, to exercise its protective jurisdiction in behalf of such infant parties.

I think, also, that a resale of the tannery and the premises connected with it must be ordered, because they were purchased by the guardian ad litem of the infant defendants. Section 62 of the title of the revised statutes in relation to the partition of lands, declares that no guardian of any infant party to the suit shall purchase any lands, being the subject of the suit, except for the benefit or in behalf of such infant, and that all sales contrary to this provision shall be void. (2 *R. S.* 326, § 62.) The language of this provision embraces Mr. Wait. He was the guardian ad litem of the infant defendants, who are the heirs of one of the owners of the tannery and lands connected therewith, being the subject of the suit; and he did not purchase these premises for the benefit, or in behalf of such infant defendants. It will be observed, that under the statute no purchase by the guardian can be valid, unless it is made for the benefit or in behalf of the infant. I do not therefore see how the purchase in question can escape the condemnation of the

statute. It comes within its words, and I think also within its spirit and policy. It is no answer to the objection, that the purchase was not made by the guardian for his own benefit. The object of the statute was to secure, in behalf of the infant, the best judgment, skill and exertions of his guardian. There can be no certainty of accomplishing this end, if the guardian is permitted to purchase either for himself or a third person. It would be alike hazardous to the infant, although perhaps not in equal degree, whether the guardian was allowed to purchase for himself or a third person. In either case the infant could not expect to receive what the law intends he shall have, an exclusive devotion to his interests, from his guardian. It is for this reason that the law declares, without any previous investigation, that a purchase by a trustee, of the trust property for his own benefit, is absolutely void. (1 *Selden*, 256.) A guardian or trustee cannot place himself in a position in which he may be compelled to disregard either the interest of his ward, or cestui que trust, or his own interest or that of some third person. Mr. Wait, by assuming the agency of Smith & Croe, placed himself in such a position. As agent of Smith & Croe, it was his duty to purchase the property for the lowest possible price; as guardian, it was his duty to cause it to be sold for the highest possible price. This is a position the law did not permit Mr. Wait to occupy, and it is one intended to be forbidden by the statute. It is argued by the counsel for Smith & Croe, &c. that Lefevre is not at liberty to take this objection to the sale; and that it can only be taken on a proper application by the party injured. I concede that Lefevre cannot apply for a resale upon this ground; which affects only the present defendants. But I do not concede that the court has not the power, or that it is not its duty, without any application by an infant party, to interpose in his behalf to prevent a sacrifice of his property. As the fact of the purchase by the guardian, for the benefit of Smith & Croe, at a price injurious to the interests of the infant defendants, has, by the motion of Lefevre, been brought to the knowledge of the court, I am satisfied that it is my duty, without awaiting an application in behalf of such

infants, to order a resale of the tannery for their benefit, upon such terms and conditions as will secure to them the full value of their interest in such property. Undoubtedly in all cases of illegal purchases of an infant's property by his guardian, the court can ratify the sale, if, in its judgment, a ratification will promote the interests of the infant. In this case it is clear, that upon the offer of Lefevre, a resale will be beneficial to the infant defendants. I shall therefore order a resale of the tannery and the land immediately connected therewith, the same as purchased for Smith & Croe; provided Lefevre, within eight days, executes a bond with sufficient surety to the other owners, conditioned that he will on the resale bid $9000, and will purchase the tannery at that price, if struck off to him, and will also, in case he becomes the purchaser, allow and pay to the other owners at the rate of $2.75 a cord for their share of the bark at such tannery, and will in all respects fulfill the terms on which said tannery and premises shall be sold to him, &c. Smith & Croe must be allowed interest upon the first payment of their purchase, from the time they provided the money for that purpose, and while it remained unproductive in their hands; but they are not entitled to costs of opposing the motion, or to the payment of their expenses and damages, as the purchase by Mr. Wait for them was void, under the statute. The resale may be on a previous notice of three weeks, in case the parties interested in the premises consent thereto in writing. If Lefevre fails to give the security required, the sale to Smith & Croe must be deemed to stand for the benefit of the infants, and must be ratified; as an order directing a resale, without such security, might prove injurious instead of being beneficial to such infants.

I see no reason for disturbing the sale of the other parcels of the real estate, sold to Caleb W. Slocum and others. The advance offered on the bids for these parcels, is not sufficient to justify such an order. The motion as to these sales must therefore be denied. As Slocum and Van Housen did not oppose the motion, they are not entitled to costs. But the motion, as to Arnold, must be denied, with $10 costs. The decision

does not apply to the purchase by William I. Powers & Co., as the parties agreed, on the hearing of the motion, that the motion should not embrace that purchase. Although it is apparent from the affidavits read on the motion, and the offer of Lefevre to bid $9000 for the tannery, &c. that this property was sold at least $2000 below its value, yet I entertain no doubt that the guardian, in entering into the arrangement made with Smith & Croe, that they should become purchasers, acted in good faith, and believed that he was by such arrangement promoting the interests of the infant defendants, and that he would thereby prevent a ruinous sacrifice of their interest in the property.

[Fulton Special Term, June 10, 1856. *Paige*, Justice.]

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The People, *ex rel.* Ann Augusta Wilcox, *vs.* Morris Wilcox.

In determining the question as to the care and custody of a child, in a contest between the surviving mother and the grand parents respecting such care and custody, the interest of the child should be the governing motive with the court; and whenever that is ascertained, judgment should be pronounced accordingly, irrespective of all other considerations.

Other things being equal, the mother of a female child, whose father is dead, is the most proper person to be intrusted with her nurture, care and custody.

An appointment of a guardian, made by a surrogate, is to be deemed valid until reversed. It cannot be assailed in a collateral way, by proceedings upon *habeas corpus*.

The statute is imperative that upon an application being made to the surrogate, for the appointment of a guardian of an infant, the surrogate shall assign a day for the hearing. But if he determines that notice to the relatives need not be given, he may assign the day on which the application is presented. And where there is nothing to show that this was not done, it will be presumed that the surrogate assigned the day of the application, for the hearing.

The statute confers a discretion upon the surrogate, in respect to requiring notice to be given to the relatives of a minor, residing in the county, of an application for the appointment of a guardian.

While a child is in the custody of its general guardian, duly appointed by the

surrogate, it cannot be deemed under illegal imprisonment or restraint, merely from the guardian's refusal to deliver such child to its mother.

Upon a statute writ of habeas corpus, the powers of the officer are confined to the determination of the question whether there is an illegal restraint, and if so, to the removal of the restraint. And in the case of an infant, too young to make a choice, the officer must see that the infant is delivered to its legal custodian.

To this extent the writ may be executed by a commissioner at chambers.

A justice of the supreme court, upon a statutory writ of habeas corpus, returnable before him at chambers, possesses no other powers than such as are possessed by a supreme court commissioner, under the statute. He cannot, therefore, exercise that species of jurisdiction which belongs exclusively to a court of equity.

But upon a petition addressed to the supreme court in equity, and presented to a justice of the court at chambers, out of term, such justice has power to entertain the proceedings, and to make an order that the care and custody of an infant child be committed to its mother, and that such child be delivered over by its general guardian to the mother, to remain with her until the further order of the court.

A court of equity possesses a controlling and superintending power over all guardians, whether testamentary or appointed by the surrogate. And it will exercise that power by taking the ward from the guardian, and delivering it to its mother, or some other person, whenever the interest of the ward requires it.

PROCEEDINGS upon *habeas corpus*, instituted by the relator, to obtain the possession and custody of her infant daughter. The facts are set forth in the opinion below.

H. R. Mygatt, for the relator.

J. A. Spencer and *W. O. Merrill*, for the respondent.

MASON, J. This is a proceeding upon habeas corpus, instituted by the relator, to obtain possession and custody of her infant daughter, Theresa Wilcox, who was eight years of age in December last. The relator was married to Nathan B. Wilcox, a son of the respondent, in February, 1838, and who died in February last, leaving him surviving the relator, his wife, and two infant daughters, Theresa and Charlotte; Charlotte being two years younger than Theresa. At the time and after the birth of Theresa, the relator was in such feeble health that she was

unable to have the care and charge of Theresa, and she was taken, when but a few weeks old, to the respondent's, where she has remained ever since. Mrs. Wilcox, the wife of the respondent, has had the charge of her, assisted by her daughter. The grand parents and family have become very much attached to her. Nathan B. Wilcox became very intemperate; and in July, 1848, the relator's father, Ira Wilcox, who resided in Oxford, Chenango county, took her from him and she ceased to cohabit or live with her husband from that time, who, it would seem from the evidence, continued to be very intemperate up to his death, and died of *delirium tremens* in February last. At the time the father of the relator took her home, in 1848, Theresa had been with her mother at Utica, her then residence, for a short time, and she was taken by the relator's father to the respondent and left there under an agreement that he should pay $52 a year towards her support, and which sum he has paid every year since that time. It would seem from the evidence in the case, that the father of Theresa never made any legal disposition of the custody or guardianship of this child; and his declarations in regard to his desires as to the future custody of the child are quite inconsistent. If the respondent's witnesses are to be credited—and we find no reason to disbelieve them—he verbally gave this child to his mother, the wife of the respondent, and enjoined upon the respondent and his wife that they should always take care of her and regard her as they would their own child. While on the contrary, the relator produces and proves letters written by him during the years 1852 and 1853, and some of them after it is alleged that he had given Theresa to her grand parents. In these letters he expresses a strong desire that his two daughters should be brought up together and by their mother, and in two of the letters at least, expresses a determination to take Theresa from her grand parents and commit her to her mother, the relator. In these letters to his wife he speaks of the difficulty of severing the ties of attachment which exist on the part of the grand parents towards this child, and says, "*I expect when the time comes for her to go, there will be a fuss.*" It would seem

from this correspondence that the father desired that this child should be brought up by her mother and with her sister; and it is quite difficult to reconcile his letter of February 6th, 1852, with the idea that he preferred to commit the custody of this child to the respondent and his wife rather than to the relator. Ira Wilcox, the father of the relator, a man of fortune, died November 29, 1852, making a very handsome provision in his will for the two children of the relator. They are to receive an annuity of $300 each, until they attain the age of twelve years, when it is to be increased to $600, until they attain the age of twenty-one years, when they are each to receive a very handsome estate. The relator has an annuity under the will of her father of $1500. This annuity to these two children is by will placed in charge of the relator, "*to be expended by her in the nurture, maintenance and education of said children,*" and this child has no other property. It seems from the evidence in the case, that after the father of the relator took her home in 1848, he interdicted all intercourse between the relator and her husband, unless short interviews were had in the presence of the family or of some members of it; and it seems from the evidence that the relator never visited the family of the respondent after she separated from her husband in 1848, until after the death of her husband and on the first of June last, when she went to obtain Theresa. She has seldom seen Theresa since 1848, and then only when she was brought to Oxford by her father on a visit for a few days. She swears, however, that she has always been desirous of obtaining her, and having the custody, nurture and education of her herself; and it appears from the evidence, that in 1851 she made an effort to obtain her, and the consent of her father was obtained, but the grand parents refused to let her go: the father all the while affirming that he was willing she should go if the grand parents were willing, but they refusing she was allowed to remain. The father of Theresa died on the 7th day of February last, while the relator was temporarily absent from the state and in Florida; and on the 10th day of February, but three days after the death of the father, the respondent, in the absence of

the relator from the state, was on petition to the surrogate of Oneida county appointed general guardian of Theresa. This appointment was made on the same day of the application and without notice to any of the relations, although the application shows that there were relations living in the county of Oneida.

It appears from the testimony given before me, upon this investigation, that the relator is a lady of refinement and education, entirely competent to have the nurture and education of her children committed to her; and it appears quite satisfactory, from the evidence, that the child has been uncommonly well cared for in the family of the respondent, and that they are very much attached to the child, and the child very much attached to them; and I entertain no doubt but the wife of the respondent has proved herself a faithful mother to the child, and that she is entirely competent to the proper discharge of all the duties of nurture and training, which the interest of this child may require. And I entertain as little doubt, from the evidence before me, that no detriment can arise to this child from any want of respectability of the family in which she has been thus far reared. The respondent and his family have maintained a respectable standing and position in society, and the long acquiescence of the relator and her father in the residence of this child in the respondent's family implies all this. I do not attach very much importance to the unguarded, and to say the least, highly improper and violent expression of the respondent at the time the relator called with Mr. Mygatt to obtain her child. They were words spoken under a very high state of excitement, and it is but charitable to attribute them to an outburst of uncontrollable feeling. I cannot think the respondent is a man of general profanity, or of ungovernable passions. The relator having resided in his family must have known him well, and if such had been the case I cannot think she would have consented to have the child remain so long in his family; and we should reasonably expect that if such was the case, some general evidence at least of the fact would have been given on this investigation. The case is not one free from embarrassments, as to the duty of the court in regard to the determination which

should be made as to the custody of the child. I found, on examining the child, that she most decidedly prefers to remain where she is, with her grand parents. She expressed herself very decided in her preference. She appears to be an active sprightly child, in her ninth year, and when I asked her why she preferred to remain with them, rather than go and reside with her mother, she answered that her mother was a stranger, and that she knew grandpa and grandma, and I have no doubt that she would have said she loved them better than her mother. This is no more than we should expect; it is the infant heart speaking its simple language in behalf of those who have nurtured, fed and watched over it from its first impressions and recollections, for a period of almost nine years. It is the hand that has fed, the eye that has watched, and the heart that has showered its smiles and caresses upon the infant for the first nine years of its existence, that may confidently claim its love and affection; and if left at that period to determine for itself, no one can doubt with whom it would go. At this tender age it scarcely realizes any other mother than the one who fills this place in its childish affections; and I agree with Justice Patterson in *Re Preston*, (5 *Dowl. & Ryl.* 247,) where he says, "It seems to me but mockery to ask a child of nine years of age, whether it would sooner remain with a person who brought it up or go with a stranger." It seemed to me on the trial altogether useless to question this child, and I stated to the counsel that I would assume that the child would prefer to live with those who had brought her up, and the examination was only made as it was insisted on as a duty devolving on the court. The fact, however, that this child has lived in the respondent's family almost from its birth, I might say, and that she has become very much attached to the grand parents and they to her, is not to be wholly overlooked in determining the question before us. The severing of that connexion will cost both this child and the grand parents some bitter pangs. The interest of the child, however, must be the governing motive with the court, and whenever that is ascertained, the judgment of the court must be pronounced accordingly, irrespective of all other considerations

As regards the child, I entertain no doubt but if placed with her mother she will soon become attached to both her and her sister; that she will soon learn to love her mother as she has loved her grand parents. And this it is most certainly the duty of the court to promote. By common consent, in accordance with the dictates of nature and humanity, the mother is regarded as the guardian by nature and nurture of young children, and is no doubt generally better calculated than any other person to nurture, train and protect them, both in sickness and in health, in the years of infancy. The wisdom of the common law cannot be doubted, when it declares that upon the death of the father, the mother becomes the guardian by nature and nurture of the infant children. And such is the language of the common law in all countries where the statute law has not broken in. (*Roach* v. *Gowan*, 1 *Ves. R.* 158. *Rex* v. *Waughford*, 1 *Ld. Raym.* 395. 2 *P. Wms.* 116. *McPherson on Infants*, 66, 72. 3 *Atk.* 624. 1 *Black. Com.* 461. *Forsyth's Custody of Infants*, 9, 10, 108. 4 *John. Ch. R.* 80. 2 *Kent's Com.* 148, 149. 1 *Russell*, 21. 6 *Greenl.* 462.) I cannot but attach some importance, in determining the question before us, to the fact that the only property which this infant has for her education and support, is by the will of her maternal grandfather placed in charge of the mother, to be by her expended for the benefit of the child; and it is in my opinion quite important to the welfare and happiness of these two sisters, who hitherto have been strangers to each other, that they should be brought up and educated together. There is some two years difference in their ages, and they should be brought together, that they may learn to love each other and regard each other as sisters, and be taught the important duties of the relation in which they stand to each other, and to their mother. (*Forsyth's Custody of Infants*, 35. 2 *Serg. & Rawle*, 174. *White's Eq. Cas.* 172.) There is another feature of this case which it seems to me is entitled to very considerable consideration in determining the question before us. It is the relation which exists between the relator, and the respondent and his family It is quite apparent from the evidence before me, that they are

of one household; and I can come to no other conclusion, from the evidence before me, than that if this child is to continue to reside in the family of the respondent, she will, in all probability, grow up a comparative stranger to her mother and sister. This is a result which would be deplorable indeed to the interest and happiness of both of these infants, and one which should be avoided if it can be, without bringing still greater prejudice upon this child. For these and other considerations which might be suggested, I have come to the conclusion that the interest of this child would be best promoted by committing its custody to the mother. "She," as has been well expressed by the late chancellor of this state, "all other things being equal, is the most proper person to be intrusted with such a charge. The law of nature has given her an attachment for her infant offspring, which no other relative will be likely to possess in an equal degree; and where no sufficient reason exists for depriving her of the care and nurture of her child, it would not be a proper exercise of discretion in any court to violate the law of nature in this respect." (*The People* v. *Mercein*, 8 *Paige's R.* 47.) In attaining this conclusion, however, I have not been unmindful of the facts appearing on this application, calculated to detract somewhat from the force of these remarks, as applicable to the present case. The fact that this child has been reared to almost the age of nine years a comparative stranger to her mother, and her mother a comparative stranger to her, with the consequent fact of the affections of the child having been so long bestowed upon the grand parents, is calculated to render somewhat doubtful this application of the rule above stated, in its full force, to the case under consideration. And when we add to this what we should naturally expect to exist in this case, the fact that for almost seven years the relator has bestowed her almost undivided affection upon the younger sister, Charlotte, it is not without some misgivings as to the accuracy of the judgment which removes the child from its present abode. The relator, as mother of these children, will undoubtedly have to surmount many embarrassments and difficulties which do not fall to the lot of mothers generally. If Theresa is placed under

her charge and control she will have to gain the affections of a child literally weaned from her, and whose affections have for so many years been bestowed upon another, and, having by her side at the same time a younger sister, who I doubt not has been accustomed to share alone a mother's affections. This young child must, of course, be taught to know why another has come to share with her a mother's affections and regard, and it will require all of a mother's tenderness and fortitude to meet all the conflicting interests, and rear these children amid the jealousies and difficulties which naturally arise amongst children of the same family after so long a separation. This, however, can all be done. The mother is competent to perform just such a task. These seeming difficulties will all give way before a mother's wise training and counsel; and I doubt not, from the evidence before me, that the relator is abundantly competent tc discharge these delicate and highly responsible duties which she is so desirous for the welfare of her children to take upon herself. I shall therefore deem it my duty to commit the possession of this child to the mother, unless it should be found that there are legal difficulties and objections in the way.

This brings me to consider the legal objections raised by the counsel for the respondent. It is claimed and insisted in this behalf, that the respondent is the legally constituted guardian of this child, and as such is entitled to her custody and control. I am entirely satisfied, after a careful examination of the matter, that the appointment of the respondent by the surrogate of Oneida as the general guardian of Theresa is valid until reversed, and that it cannot be assailed in this collateral way, by proceedings upon habeas corpus. (*The King* v. *Hopkins*, 7 *East*, 579. *Ex parte Hopkins*, 3 *P. Wms.* 155. *The King* v. *Deleval*, 3 *Burr.* 1436. 10 *Ves. R.* 66, *note* 4. *The People* v. *Mercein*, 8 *Paige's R.* 47.) There are three objections raised to the legality of this apportionment. The first is, that the surrogate did not assign a day for the hearing, but made the appointment on the same day the petition was presented. The statute seems to be imperative that the surrogate shall assign a day. (2 *R. S.* 157, § 5. 9 *Paige's R.* 206.) The surrogate

may assign the day on which the application is presented, if he shall determine that notice to the relatives need not be given. There is nothing in the papers to show that this was not done. We must presume, therefore, that the surrogate assigned the day of the application for the hearing.

The second objection is, that no notice of the application, or of the hearing, was given to the relatives of the minor residing in the county. The answer to this objection is, that the statute confers a discretion upon the surrogate, in this respect. The statute, as originally framed and enacted in the revised statutes, seems to have contemplated that all of the relatives residing in the county should be notified. (2 *R. S.* 151, § 5.) But the act of 1831 has modified the provisions of the revised statutes in this respect, by declaring that notice shall be required to be served on such relatives only of the minor as the surrogate shall direct. (*Laws of* 1847, *p.* 532, § 44. 9 *Paige's R.* 207.) There is nothing in the papers before me to show that this statute was not complied with. The third objection is, that the application to the surrogate was fraudulent in alleging the residence of the relator in Florida, when the petitioner knew she was a resident of this state. We cannot attach much importance to this objection, for there is nothing in the statute which would require notice to be given to the relator, as her residence was in the county of Chenango; and besides, I have not been able to discover the fraud in this respect imputed. The respondent being the lawfully constituted guardian of the infant, and possessing under the statute the same powers of a testamentary guardian, (2 *R. S.* 157, § 9; *Id.* 150, § 1,) it is claimed and insisted, that while this child is in the custody of the respondent, she cannot be deemed under illegal imprisonment or restraint, by his simple refusal to deliver her to the relator. This position, it seems to me, is too clear to require discussion or elucidation. I will not go through with a review of the cases to prove this position. This labor has been most faithfully performed by Judge Duer of the superior court of the city of New York, in the case of *The People* v. *Porter*, (1 *Duer*, 709, 719, 720.) I will content myself by referring to the opinion of Judge Duer

in that case, and to the opinion of Judge Coleridge in the case of *The King* v. *Greenhill*, (4 *Adol. & E.* 642,) where the true rule upon this subject is most lucidly enunciated. In the latter case the learned Justice Coleridge, in speaking upon this subject, says, "a habeas corpus proceeds on the fact of illegal restraint." He adds, "where the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple and disposes of many cases, namely, that the individual who has been under restraint is declared to be at liberty, and the court will even direct that the party shall be attended home by an officer, to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists." In the case of *The People* v. *Porter*, Judge Duer, after quoting the language of Justice Celeridge, supra, with approval, adds, "an infant of such tender years as to be incapable of rationally expressing its wishes, which is all I can understand by incapable of making a choice, is of necessity under restraint; and in order to determine whether the restraint is legal, the court must determine to whom the custody belongs, (1 *Duer*, 719, 720;) and in order to remove the illegal restraint, the court must see that the infant is delivered to its legal custodian." (*Id.*) To this extent I entertain no doubt the legitimate office of our statute writ of habeas corpus extends, and to this extent it may be executed by a commissioner at chambers. I am saved the necessity of an argument to prove that the extent of the office of our statute writ of habeas corpus is the removal of the illegal restraint of the party brought up by the writ, by the very able and, it seems to me, conclusive opinion of Judge Duer in the case of *The People* v. *Porter*, above referred to, (1 *Duer*, 709,) in which opinion his associates, Chief Justice Oakley and Judges Campbell and Bosworth, concurred. If, therefore, I am to regard the present writ purely as the statute writ, which I am to execute as commissioner under the statute, then it seems to me very clear that my powers are confined within the rule above indicated. If so, I need not add that the relator cannot have the

relief sought by this writ upon these proceedings; for while the infant of nine years of age, who, as we have seen, is incapable of exercising any discretion, is in the custody of its legally constituted guardian, the person to whom the law confides it, it cannot be said to be under illegal restraint; where the legal custody is, in such a case, there is no restraint.

The counsel for the relator claimed and insisted, upon the argument of this case, that upon this writ and these proceedings, I possessed all the powers of the late court of chancery, and that admitting the legal custody of this child to be with the respondent, a court of equity possesses a controlling and superintending power over all guardians, and will take the infant from the guardian and deliver it to another, whenever the welfare and interest of the infant requires it. The question presented is one of jurisdiction. If I am to be considered as invested with the powers of the court of chancery, in the execution of the proceedings upon this writ, then there is no question of jurisdiction. The power of a court of equity in such a case is not to be questioned. It rests upon undoubted authority, and I will content myself with a reference to a few cases. (*De Manneville* v. *De Manneville*, 10 *Ves.* 5. *Creuse* v. *Hunter*, 2 *Cox's Cas.* 242. *Wellesley* v. *Wellesley*, 2 *Bligh's Par. Rep. N. S.* 124. 1 *Dow & Clark*, 152. 5 *Paige*, 597. 8 *id.* 47. *Forsyth's Custody of Infants*, 704, 705. *White's Eq. Cas.* 500. 2 *Story's Eq. Jur.* § 1341. 2 *Kent's Com.* 227, 3*d ed.* 2 *John. Ch. R.* 439. 8 *Cowen*, 359.) The jurisdiction is the same over testamentary guardians and guardians appointed by the surrogate, as it is over guardians appointed by the court itself. (2 *John. Ch. R* 439. 8 *Cowen*, 350. 8 *Paige*, 47. 2 *Kent's Com.* 227, 3*d ed.* 4 *John. Ch. R.* 80.) Under the exercise of this jurisdiction a court of equity will control the guardian, by taking from him the infant and delivering it to its mother, or other person, whenever the interest of the infant requires it. And were the same facts which have been established in this investigation to appear before me at any stated term of the court, either by petition or in a plenary suit, I should deem it my duty, for the reasons above stated, to order and direct the respondent to de-

liver this child to the relator. I entertain, however, very great doubt as to my right to do so upon these proceedings. My right to do so involves a question of jurisdiction, and after the most careful examination and deliberate reflection I have been able to bestow upon it, I have come to a conclusion adverse to my jurisdiction. I will proceed very briefly to state the reasons which have induced this conclusion: I have shown in a former part of this opinion that this child, while in the custody of the respondent, is under no illegal restraint, and that, confining my authority to the strict and legitimate office of the statute writ of habeas corpus, this infant must be left with the respondent, its legally constituted guardian. In the second place, I take it to be very clear, that as this writ was issued and returnable before me at chambers, I do not possess any of the powers which belong to a court of common law, under a common law writ of habeas corpus; for the common law writ can only be granted upon a motion in court. (*The People* v. *Porter*, 1 *Duer*, 714. 4 *Bac. Ab.* 575, *Bouv. ed., tit. Habeas Corpus*, (*B*) 4. 3 *Black. Com.* 152.) And were I at liberty to treat the present as a common law writ. and in pronouncing my judgment to assume the powers not indeed of chancery but of common law courts, it is exceedingly doubtful whether I would be justified in making the order desired. (1 *Duer*, 715 *to* 728, *and cases there referred to.*) It remains to be considered whether this power is possessed by me, in the execution of this writ, in virtue of the chancery powers conferred upon the supreme court and the justices thereof.

The supreme court, as at present organized in this state, possesses all the powers of the late supreme court and the court of chancery; and by the 76th section of the judiciary act, commonly so called, the justices of the present supreme court possess all the powers and jurisdiction of the former justices of the supreme court, the chancellor, the vice chancellor and circuit judges. (*Laws of* 1849, *p.* 323, § 16.) The argument submitted by the counsel for the relator upon this branch of the case is substantially this: that as a justice of the supreme court I possess all the powers of the late chancellor, and that

as the court of chancery is always open, and the chancellor could issue the writ out of his court at any time, on an application to him, in virtue of his common law powers, a justice of this court can do the same. I entertain no doubt of the soundness of this argument. I do not doubt that upon a proper petition to me at chambers, invoking the exercise of the equity powers of the supreme court, I might grant the order directing the issuing of the writ out of that court, and making it returnable therein. The late chancellor possessed the power to execute this writ as a commissioner, under the statute. (2 *R. S.* 563, § 25. 8 *Paige*, 47. 25 *Wend.* 95.) The power to execute this writ was also an incident to his court. It is an inherent power in the court of chancery, derived from the common law. (8 *Paige*, 47. 25 *Wend.* 95.) The practice of the late chancellor was to issue the writ out of his court, under the seal of that court, returnable before the chancellor in the court of chancery. (8 *Paige*, 47. 25 *Wend.* 95.) If the chancellor assumed to execute the statute writ of habeas corpus as a commissioner under the statute, his powers were the same as those of a supreme court commissioner. It becomes important to inquire, therefore, whether I am to regard this application and the proceedings upon this writ, as had before me as a justice of the supreme court, or a commissioner under the statute, or as a proceeding in a court of equity. The petition presented to me, and the proof annexed thereto, it seems to me, must settle this question. The petition itself conforms to the strict requirement of the statute. This and the accompanying proofs show that the design of the applicant was not only to lay the foundation for the statute writ, but also to make the proofs required on an application to a commissioner not residing within the county where the infant is detained.

If the application be to one of the officers named in the statute as commissioner, the application must be to an officer residing in the county where the person to be brought up is illegally detained. If, however, there be no such officer within the county, or if he be absent, or for any cause incapable of acting, or if such officer shall have refused to grant such writ

then the application may be made to some officer having authority, residing in any adjoining county. The statute (2 *R. S.* 564, §§ 25, 26) provides that whenever an application for such a writ shall be made to any officer not residing within the county, proof shall be made of the facts above stated, before the officer shall be allowed to issue the writ. The relator made this proof before me. If the application were to the equity side of the supreme court, no such proof is required. But again, no order was entered with the clerk of the court awarding the writ, as is customary. The writ was issued out of the supreme court, and as was customary when issued out of the court of chancery. (25 *Wend.* 95.) This writ itself is not returnable in the supreme court, nor is it returnable before me in the supreme court, as was the form of the chancellor's writ.

Upon the return of the writ the respondent moved to supersede or quash the writ, for the reason that the special county judge of Oneida was authorized to execute the writ, and that he was not absent from the county, and had not been applied to to issue the writ; and upon this motion it was not even suggested by counsel, nor did the idea for once occur to me, that this was to be deemed a writ issued by the court. It seems to me, therefore, that if a judge at chambers can ever be justified in acting at the same time and in the same proceeding in a double capacity, it is quite clear that I cannot do so on the papers before me, if I felt inclined to do so. I am entirely satisfied that upon this writ I possess no other powers than such as are possessed by a supreme court commissioner under the statute, and that consequently I cannot, without a usurpation of authority, assume or exercise that species of jurisdiction which belongs exclusively to a court of equity. I am aware that some of the common law judges, in speaking of the discretionary power of the court upon habeas corpus in the case of infants, have spoken quite loosely on this subject, but this was in cases of writs issuing out of the court where the common law powers might be exercised; but, what is a little remarkable, in all these cases the exercise of that discretion was declined. I have examined with some care all of the

cases referred to upon the argument, and many others, and I do not hesitate to declare that no adjudged case can be found in the books where, in the execution of this writ, a judge at chambers has assumed, upon the facts appearing in this case, to grant the relief sought. It only remains for me to say, that as I find that Theresa Wilcox is not "imprisoned, detained, confined or restrained of her liberty in any manner or upon any pretense whatever," and as I have come to the conclusion that I have no jurisdiction to grant that equitable relief in the premises which belongs to a court of equity, all further proceedings upon this writ must be dismissed, without prejudice however to the rights of the relator upon any subsequent application by petition or otherwise.

Upon the determination of the proceedings above mentioned, upon the writ of habeas corpus, on the 22d day of August 1854, the said Ann Augusta Wilcox presented to Justice MASON her petition, setting forth the proceedings had upon the said writ of habeas corpus and all the depositions taken upon said proceedings, both in behalf of the relator and the respondent, and setting forth her claim to the custody of the said infant, assigning various reasons why the custody of the said infant should be given to her for nurture and training. This petition was addressed to the supreme court in equity, and presented to the said justice at chambers, out of term; who thereupon granted an order that the said Morris Wilcox show cause before him, at his office in Hamilton, on the 31st day of August then inst., why the prayer of the said petition should not be granted and the custody of the said child committed to the petitioner. Upon the day named for that purpose, the parties appeared before the said justice; and the said defendant, by his counsel, made the following objections, and argued the same before the said justice

"*First.* That this motion cannot be heard upon the papers served; because, 1st, the affidavit and papers were not made in this proceeding, but in a former and different proceeding, in which they had been used, and that they belonged to such

former proceedings; 2d, that they are not applicable to this proceeding.

Second. That this is not a motion that can be made and heard at chambers, but that it should be made and heard at and in a regular appointed term of this court, if at all.

Third. That this proceeding is for the enforcement of an alleged right, and should be enforced by an action commenced in the usual way under the code of procedure, or by petition at a regular term of this court.

Fourth. That the said justice has no jurisdiction to hear and determine the matter in controversy at chambers and grant the order asked for, and that the proceeding cannot be had in the county of Madison, but should be had in the county of Oneida."

The hearing upon the said petition was by consent of parties adjourned to the 20th day of September thereafter, and the question raised as to the jurisdiction of the said justice was reserved, and in the meantime the question of jurisdiction examined; and on the said 20th of September, before any further proceedings were had on said petition, said justice announced to the parties that he had examined the question of the jurisdiction of a justice of the supreme court to entertain such a petition at chambers, out of term, and had come to the conclusion that such jurisdiction existed in the justices of the supreme court, and that he should entertain the proceedings upon said petition. The respondents did not appear further upon said proceedings. The petitioner proved her case, and the said justice on the said 20th day of September, 1854, made an order that the care and custody of said Theresa Wilcox be committed to her mother, the petitioner, and that she be delivered over by the respondent, her guardian, to her mother, there to remain until the further order of the court. The said petition being filed and the order duly entered, and a copy thereof served on the respondent, he appealed from the whole of the said order to the general term. The case was argued in the general term and the order affirmed, and the respondent appealed to the court of appeals, where the case was argued

and the order was affirmed. The main question argued and discussed, both in the general term of the supreme court and in the court of appeals, was whether a justice of the supreme court has the authority, out of term, to entertain petitions and proceedings in equity; and the determination of this case settles the question that such jurisdiction is possessed, and may be exercised out of term.

[At Chambers, September 20, 1854. *Mason*, Justice.]

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Chrystie and wife *vs.* Phyfe and others.

A testator, by his will executed previous to the revised statutes, after providing for his two eldest daughters, gave to his daughter M. a house and lot in Partition street in the city of New York, to her and to "her heirs and assigns forever," with the qualification, however, that if she died "unmarried and without leaving a child her surviving," then all her share of his estate, both real and personal, was to go to her sisters, or their children, as the case might be; but if she should die, either before or after the testator's decease, leaving lawful issue, then her share in said estate to go to such child or children, their heirs and assigns forever. *Held* that M. took an estate in fee, defeasible by law in the event of her dying before her father, and defeasible by will in the event of her dying after him, leaving no issue. And M. having afterwards married, and joined with her husband in conveying the house and lot in Partition street to the defendant P. and died, leaving issue, E. the wife of the plaintiff; *held further*, that her estate in fee vested and became absolute in her, and as a consequence in P. her grantee; and that upon M.'s death the property did not go to E. Clerke, J. dissented.

APPEAL by the defendants from a judgment rendered at a special term, after a trial at the circuit. The action was for the recovery of the possession of a house and lot in the city of New York. The plaintiffs claimed to recover the same in the right of Elizabeth L. Chrystie, who is the daughter and only surviving child of Margaret Thornton Ludlow, wife of Charles Ludlow, (formerly Margaret Thornton Mackaness,) under and by virtue of the will of Thomas Mackaness, (father of said Margaret, and grandfather of said Elizabeth,) who in 1807 died seised of the prem-

ises; and the defendants claimed to be the absolute owners thereof, by title derived from said Charles Ludlow and wife, Mrs. Ludlow having as they alleged acquired, under and by virtue of said will, an estate in fee simple absolute in said premises. The complaint alleged, 1st. That Thomas Mackaness being seised and possessed in fee of the house and lot No. 32, adjoining Partition street, in and by his last will and testament, dated the 15th of February, 1806, and executed with the solemnities then prescribed by law for devising and passing real estate in fee, devised said house and lot to his daughter Margaret Thornton Mackaness, *her heirs and assigns forever;* but if his daughter should die unmarried and without leaving a child her surviving, then said testator gave, devised and bequeathed said house and lot, and also all such other parts of his real and personal estate as by that his will were given, devised and bequeathed to her, to his daughters Elizabeth Harvey and Mary Prowitt, their heirs and assigns forever, in equal parts to be divided; but if his said daughter Margaret should die either before or after his decease, leaving lawful issue, then he gave, devised and bequeathed the part and parts, share and shares, of his real and personal estate, by that his will given, devised and bequeathed to her, unto such child or children, if one only, to him or her solely, and his or her heirs and assigns forever, if more than one, to them, their heirs and assigns forever, equally to be divided between them, share and share alike; and in case his said daughter Margaret should die without lawful issue, and if at her death either of his said daughters, Elizabeth Harvey and Mary Prowitt, should then be dead, and should have a child or children then living, the said testator gave, devised and bequeathed the part or parts, share or shares, of his real and personal estate, devised and bequeathed to their respective mothers, so being dead, to such child or children, if one only, to him or her the whole, and to his or her heirs and assigns forever, and if more than one, to them, their heirs and assigns forever, in equal parts to be divided. 2d. The death of the testator shortly after the making of his will, leaving it in full force, and in the seisin and posses

sion of the premises. 3d. The proving and admitting to probate of the will in due form of law. 4th. That by virtue of the will, said Margaret Thornton Mackaness entered into possession of the premises, and became seised thereof for the estate, and became subject to the devises, &c. in the events and upon the happening of the several contingencies in the said will mentioned. 5th. That the said Margaret afterwards intermarried with Charles Ludlow, by whom she had lawful issue, viz. three children, the eldest of whom is Elizabeth L. Chrystie, (one of the plaintiffs;) and of the other two, one was still-born, and the other survived only a few days after its birth. 6th. The death of Charles Ludlow in 1839, and of his widow, Margaret Thornton Ludlow, on the 27th of June, 1853. 7th. That the plaintiffs were married in 1838, and have four children living, the eldest aged 14 years. 8th. That upon the death of Margaret Thornton Ludlow, the plaintiff, in the right of the said Elizabeth L. Chrystie, under and by virtue of said will, became seised of an estate of inheritance in fee simple in said premises, and lawfully entitled to the possession thereof, said premises being now known by the street number 193 Fulton street, and being described in the complaint by metes and bounds. 9th. That Duncan Phyfe, the defendant, is in possession of the premises, claiming title thereto, or some interest therein, or lien thereon, but unlawfully; and that possession thereof has been demanded of him by the plaintiffs, but that he has refused or neglected to deliver such possession to them, or either of them; wherefore the plaintiffs demand judgment, that the defendant be adjudged to surrender the possession of the said premises to them, and to pay to them damages for the unlawful withholding of the same to the sum of $10,000, with the plaintiffs' costs and charges. The answer of the defendant Duncan Phyfe stated, 1st. That the defendant, on information, advice and belief, claimed and insisted that the said Margaret Thornton Mackaness, under and by virtue of the will of the said Thomas Mackaness, and under and by virtue of the devise to her in the complaint mentioned and of other provisions in said will contained became seised of, and entitled to, a good, absolute and

indefeasible estate of inheritance in fee simple in the premises in the complaint described; and being so seised and entitled, entered into the lawful possession of said premises, and became lawfully seised and possessed thereof, as the absolute owner thereof. 2d. That the said last will and testament was in the words following—and the same was then set forth in *hæc verba*. 3d. The defendant, on information and belief, denied that said Margaret Thornton Mackaness entered into the possession of the said premises, and became seised thereof, for any such estate, subject to any such devises, &c. as were for that purpose mentioned in the complaint. 4th. That said Margaret having afterwards intermarried with Charles Ludlow did, with her said husband, by their deed dated the 17th of May, 1815, in consideration of $9250 to them paid, grant and convey to the defendant the said premises in fee, which deed was duly acknowledged and recorded, and which the defendant was ready to produce, &c. 5th. That the defendant thereupon entered into possession of the premises as the lawful and absolute owner thereof, and has continued in the quiet and undisturbed possession and enjoyment thereof until the present time. 6th. Defendant admitted, that after the making of said will, said Margaret intermarried with Charles Ludlow, and subsequently departed this life, having survived her husband and leaving issue, viz. Elizabeth L. Chrystie, one of the plaintiffs; but defendant had no knowledge or information sufficient to form a belief as to the allegation in the complaint concerning the births or deaths of the children of said Margaret, &c. 7th. The defendant denied that the plaintiffs, after the death of said Margaret Thornton Ludlow, did, in the right of said Elizabeth L. Chrystie, and under and by virtue of said will, become seised of or entitled to said premises; but he averred that he, the defendant, alone was seised in his own right of the premises in fee simple absolute; and he denied any unlawful withholding of the possession of said premises from the plaintiffs, or either of them, &c. The defendant Duncan Phyfe having died in the month of July, 1854, leaving a last will and testament, whereby he devised all his real estate equally to and among his children, viz. Mary Whit

lock, Eliza Vail, wife of William Vail, William Phyfe, James D. Phyfe and Edward D. Phyfe, in fee, the action was continued, on the petition of the plaintiffs, by order of the court made with the consent of the attorney for said devisees, against them as defendants therein. The action was tried on the 16th of January, 1855, before Hon. WM. MITCHELL, one of the justices of this court, without a jury—a trial by jury having been duly waived. The plaintiffs proved the death of Charles Ludlow in October, 1839, and of Mrs. Ludlow on the 27th of June, 1853; also that they had three children, one of whom was stillborn, and the other lived but a few days, and both died before their father; also that Mrs. Chrystie was the second child, and that Mr. and Mrs. Chrystie were married in October, 1838, and have living four children, and rested their case. The defendants then produced and gave in evidence the last will and testament of Thomas Mackaness, dated the 15th of February, 1806, in the words set forth in the answer, and also a conveyance dated the 15th day of June, 1815, between Charles Ludlow and wife of the first part, and Duncan Phyfe, the father of the defendants, (except William Vail,) of the second part, of the premises in question, which conveyance was set forth *in hæc verba*. It was for the consideration of $9250, and grants the premises to said party of the second part, his heirs and assigns forever, to have and to hold the same as fully and absolutely as the said Thomas Mackaness was seised or possessed at the time of his death, with full covenants, on the part of said Charles Ludlow of seisin and power to convey, in his said wife Margaret, and of warranty, &c.; and it was acknowledged by the grantors, and by Mrs. Ludlow, on a private examination before W. Ross, master in chancery, on the 17th of June, 1815, and recorded in the register's office on the 1st of July, 1815. It was admitted by the plaintiffs' counsel, that the premises described in this deed were the same as those described and devised in the fourth article of the will, and demanded in the complaint. The defendants' counsel insisted and prayed the court to rule and decide, 1st. That Margaret Thornton Mackaness upon the true construction of the will, took under and by virtue

thereof an absolute and indefeasible estate of inheritance in fee simple in the premises in question. 2d. That under and by virtue of said deed of Charles Ludlow and said Margaret his wife, to Duncan Phyfe, the said Phyfe acquired the like estate in said premises. 3d. That under and by virtue of the will of Duncan Phyfe, referred to in the plaintiffs' petition for the revival of the action, the present defendants, devisees of said Duncan, acquired the like estate in said premises; and that, therefore, the defendants in this action were entitled to judgment in their favor, with costs. The judge refused to decide either of the propositions as prayed; but, on the contrary, decided that, under the will of Thomas Mackaness, said Margaret did not take an absolute and indefeasible estate of inheritance in fee simple in the premises in question; and that Duncan Phyfe, under the deed above mentioned, did not acquire such estate in fee simple in said premises; and that although the defendants, William Phyfe and the other devisees in the will of Duncan Phyfe, acquired under his will all his title and estate, and all the title and estate of said Margaret Thornton Mackaness in the premises, they did not acquire an estate in fee simple absolute therein; and that the plaintiffs were entitled to judgment, as demanded in their complaint. The defendants' counsel excepted to the several refusals of the justice to rule and decide as above prayed, and also to the several decisions made by him. Judgment was then given by said justice for the plaintiffs, that they recover possession of the premises claimed in said complaint, with costs; with leave to the defendants to appeal to the general term of this court, without security, and that all proceedings on the part of the plaintiffs be stayed until said appeal was heard and decided.

B. F. Butler, for the appellants. I. Upon the true construction of the fourth article of the will of Thomas Mackaness, his daughter Margaret Thornton Mackaness acquired, under and by virtue of said will, an estate of inheritance, in fee simple absolute, in the premises in question. (1.) The will is to be construed according to the general intent of the testator, which, if

not contrary to some positive rule of law, must prevail, although at the expense of a particular intent; and although, in giving effect to it, it may be necessary to transpose, supply, or reject words and limitations. (1 *Jarman on Wills*, 420, 422, *and cases there cited. Pond* v. *Bergh*, 10 *Paige*, 152, *and cases cited. Inglis* v. *The Trustees of the Sailors' Snug Harbor* 3 *Peters' S. C. R.* 117, 118. *Finlay* v. *King's Lessee*, *Id.* 377, 388. (2.) In order to ascertain this general intent, we are not to look exclusively to the fourth article, in which the devise is contained, but are to examine and consider all the parts and provisions of the will; and in the interpretation of the terms and phrases used by the testator to demonstrate his intent, they are to receive the construction given to them by the law in force at the time the will was made and took effect. (*Covenhoven* v. *Shuler*, 2 *Paige*, 130. *Crosby* v. *Wendell*, 6 *id.* 548. *Kingsland* v. *Rapelye*, 3 *Edw. Ch. R.* 5. *Schoonmaker* v. *Sheely*, 3 *Denio*, 485, *affirming S. C.*, 3 *Hill*, 165. *Brown* v. *Lyon*, 2 *Seld.* 419.) (3.) By the will it appears that the testator had only three children, his daughters Elizabeth Harvey and Mary Prowitt, married women, and his daughter Margaret, then unmarried; and that in distributing among them his real estate, situated in the state of New York, his direct and primary devises to his married daughters were *during their natural lives only*, while those to his daughter Margaret were *in fee.* (4.) So, too, the remainders and contingent or executory estates or interests given to his daughter Margaret, in the several contingencies mentioned in the will, are in every instance *in fee*, while some of the like gifts, as well as of his primary gifts to his daughter Mary Prowitt, were *during her natural life* only, and for the most part through the intervention of *trustees.* (5.) The testator also makes his daughter Margaret, after the death of his widow, the sole devisee and legatee of the homestead in New Windsor, with all the stock, &c. thereon, and of all his household furniture. (6.) By these several discriminating provisions in favor of his daughter Margaret, the testator shows a plain intent to make her the *absolute owner and mistress* of that share of his estate which should actually

come into her possession, except so far as this absolute ownership and dominion might be modified, by the qualifying provisions contained in the fourth article. (7.) The fourth article begins with a devise of the house and lot in question to Margaret Thornton Mackaness, *in fee simple absolute*, in clear and appropriate terms. The estate thus given to her must remain in her, unless, on the true legal construction of the qualifying clauses (three in number) which immediately follow it, and by the happening of the events therein provided for, such estate in fee simple absolute be defeated or be cut down to some less estate. (8.) The first of these qualifying clauses is in these words: "But if my said daughter Margaret Thornton Mackaness shall die unmarried and without leaving a child her surviving, then I give, devise and bequeath the said last mentioned dwelling house and lot of ground, with the appurtenances, and also all such other parts of my real and personal estate as by this my will are given, devised and bequeathed to her, to my daughters Elizabeth Harvey and Mary Prowitt, their heirs and assigns forever, in equal parts to be divided." It is not necessary to inquire whether or not the limitation over in this clause, to Elizabeth Harvey and Mary Prowitt, is valid by way of executory devise; because no question now arises, or ever can arise under this limitation over, Margaret Thornton Mackaness having *married*, and having at her death left a *child*, viz. Mrs. Elizabeth L. Chrystie, her surviving. (9.) The like remark applies to the third and last of the qualifying clauses, which connects itself by its subject matter with the first clause above quoted, and in addition to the contingency of Margaret's dying without lawful issue, provides for a contingency not before expressed, viz. that of Elizabeth Harvey and Mary Prowitt, one or both of them having died *before* Margaret, but leaving children, as follows: "And in case my said daughter Margaret Thornton Mackaness shall die without lawful issue, and if at her death either of my said daughters Elizabeth Harvey and Mary Prowitt shall then be dead, and shall have a child or children then living, I give, devise and bequeath the part or parts, share or shares, of my real and personal estate, by this

my will devised and bequeathed to their respective mothers, so being dead, to such child or children, if one only, to him or her the whole, and to his or her heirs and assigns forever, and if more than one, to them, their heirs and assigns forever, in equa. parts to be divided." Whether or not Elizabeth Harvey and Mary Prowitt, or either of them, died before Mrs. Ludlow, (testator's daughter Margaret,) and if so, whether they or either of them left children or not, did not appear at the trial; nor does any question now arise under this clause. (10.) The second of these clauses, being that on which the plaintiffs rely, is in the following words: "But if my said daughter Margaret Thornton Mackaness shall die, either before or after my decease, leaving lawful issue, then I do give, devise and bequeath the part and parts, share and shares, of my real and personal estate, by this my will given, devised and bequeathed to her, unto such child or children, if one only, to him or her solely, and his or her heirs and assigns forever, if more than one, to them, their heirs and assigns forever, equally to be divided between them, share and share alike." The claim of the plaintiffs, that by this clause the estate *in fee* before given to Margaret Thornton Mackaness, is cut down to a mere estate *for her life*, with remainder in fee to her child or children *as purchasers*, is utterly repugnant to the general intent of the testator, as manifested by the language of the clause and of other parts of the will. If this clause be interpreted as a gift by the testator to the issue or children of Margaret as *purchasers*, and as reducing her estate to an estate *for her life*, the words of inheritance so carefully introduced into the devise at the beginning of the article, are rendered entirely nugatory and senseless. A construction producing such a result will not be given, if it be possible, consistently with the language used, and the rules of law to avoid it. If the testator had intended that his daughter Margaret should only have an estate *during her life* in the house and lot in question, it is inconceivable that he should not have said so in explicit terms, as in the cases of the devises to his daughter Elizabeth, and to his son-in-law Thomas Harvey, in article first, and to the trustees of his daughter Mary, in ar

ticles second and eighth. This view is fortified by the fact, that in several other instances besides those above referred to, the testator in his will gave merely life estates or interests · thus showing that the distinction between life estates and estates in fee was constantly present to his mind, and repeatedly acted on by him in the making of his will. The main object of the testator in this clause manifestly was, to provide in advance for the contingency of his daughter Margaret dying before him, and to prevent a lapse of his devises and bequests to her, in which case the property devised and bequeathed to her would go to all his heirs at law and next of kin, even though she might have died leaving a child or children. Such a lapse he intended to prevent, and in the event of her death before him, leaving issue, to secure to such issue, without the making of a new will, all those portions of his estate which he had specifically devised or bequeathed to her. Hence the careful insertion of the word "before," in the introductory part of this clause. In so framing the clause, as to provide not only for the contingency above mentioned, but also for the contingency of his daughter Margaret dying *after* his decease, leaving issue, the testator did not intend to nullify the devise in fee before made, or to cut down the estate of inheritance thereby given, to an estate for life; but he intended to reiterate and confirm such prior devise and estate. He says in this clause more fully, what, in brief technical terms, he had expressly said in the first words of the article, and what was implied in the first and third of the qualifying clauses, viz. that his daughter Margaret should have, in the house and lot in question, *an estate of inheritance*, capable of being transmitted by descent to her posterity, as her *heirs* and *representatives*. The like unnecessary and inartificial verbiage occurs in the sixth article, where the testator, after having given the use of all his household and other furniture, plate, &c. to his wife for life, bequeaths the same, immediately after his wife's decease, to his daughter Margaret, "*her executors, administrators and assigns* forever, solely at *her or their own disposal;*" and then still further to manifest his intent, that she should have an absolute estate therein, proceeds to provide,

that if his said daughter Margaret shall, at the decease of his wife, be dead, leaving a child or children then living, this furniture, &c. shall go to such child or children. The will abounds with tautological and unnecessary provisions, and though apparently drawn by a lawyer, or by one who had access to the English books of precedents of wills, yet legal terms are frequently inaccurately used, and the sense frequently obscured by the cumbrous phraseology employed by the scrivener. The testator having, immediately after the devise to his daughter Margaret of an absolute estate in fee in the house and lot in question, inserted the clause containing the devise over, in the event of her dying unmarried, and without leaving a child her surviving, seems to have been apprehensive that it might possibly be inferred, that he did not mean to give her an estate of inheritance, *in the event of her leaving* a child or children her surviving; and to exclude any such inference, he therefore inserts the clause in question, *as a qualification of the limitation over in the preceding clause.* Its meaning is simply, that if his daughter, instead of dying *without* a child her surviving, should die with a child or children her surviving, the estate of inheritance, given in the first words of the article, *should continue as first provided*—that is, a fee simple absolute, and as a consequence thereof the house and lot in question remain to her, *her heirs and assigns forever.* Clauses similar to the one now in question are found in the first and second articles of the will, following the express devises of legal or equitable estates to the testator's daughters Elizabeth Harvey and Mary Prowitt, and to Thomas Harvey, *during their natural lives;* and in every such case, the provision is necessary and appropriate. Having thus had occasion to use such phraseology, the draftsman seems to have supposed it proper to repeat it in connection with the subsequent devises, and even when the reason therefor had ceased. In the clause in question, the intent to *confirm* the estate of inheritance before given to his daughter Margaret, is clearly manifested by the care with which the testator gives to the child or children of his said daughter Margaret the real estate before devised, with inheritable words to her in precisely

the same proportions as such child or children would take the same from her under the statute of descents; if one only, to him or her solely; if more than one, to and among them equally, share and share alike. The foregoing is the fair and rational construction of the clause in question. It makes all the parts of the fourth article consistent with each other; and it is the only construction which will give effect to the clear and positive words with which the article begins, whereby the testator manifests his *general intent* to give to his daughter Margaret, in the house and lot in question, not a mere estate for *her life*, such as he had given to her sisters in the premises so devised to them, but *an estate of inheritance in fee simple.* This *general intent*, thus positively expressed, is not to be overthrown and defeated by mere construction or inference; and so far as the second qualifying clause, on which the plaintiffs rely, may seem to indicate a *particular intent* inconsistent therewith, it is to be rejected in the construction of the will. (*Collet* v. *Lawrence*, 1 *Ves. jr.* 268, 269. 1 *Jarman on Wills*, 420, 422, *and other authorities cited above.*) (11.) The claim of the plaintiffs, that by the clause in question the estate *in fee* before given to the testator's daughter Margaret is cut down to a mere estate *for her life*, with remainder in fee to her child or children as *purchasers*, is not only repugnant to the general intent of the testator before manifested, but is also directly opposed to the true *legal construction* of the article, according to which Miss Mackaness took, from the beginning, an estate in *fee simple absolute.* An estate *in fee* having been expressly and clearly given to Miss Mackaness by the introductory part of the article, the clause in question must be construed in subserviency to, and in accordance with, such prior devise. The estate in fee already given will not be cut down to a mere estate for life, by confused and repugnant phraseology in a subsequent part of the article. (*Brant* v. *Gelston*, 2 *John. Cas.* 384. *Newkerk* v. *Newkerk*, 2 *Caines*, 345, 352–6. *Jackson* v. *Bull*, 10 *John.* 19.. *Jackson* v. *Delancy*, 13 *id.* 537. *Jackson* v. *Robins*, 15 *id.* 169; *S. C.*, 16 *id.* 537. *Jarman on Wills*, 420–22, *and other authorities cited. Kingsland* v. *Ra*

pelye, 3 *Edw. Ch. R.* 11. *Weld* v. *Williams*, 13 *Metc.* 486.) If the devise in question is to be construed as impairing or affecting in any way the devise in fee simple absolute before made to Miss Mackaness, it can only be in one of two ways—either, first, by reducing her estate to a *fee tail*, or secondly, by reducing it to a *qualified, base or determinable fee*, liable to be defeated by her dying without issue living at her death. Upon either of these constructions Miss Mackaness acquired, by virtue of the will, an estate in *fee simple absolute;* in the first case she took such estate from the beginning, in the second she acquired it by the event. This will be shown under the next two propositions. (12.) Considered by itself, the clause in question, under the law as it existed at the testator's death, and according to which it must be construed, (*Jackson* v. *Bellinger*, 18 *John.* 368, 381, 382,) gave to Miss Mackaness an estate in fee simple absolute: that is to say, the words "lawful issue," "child" and "children," used in this clause, created by the English law as modified by our statute of descents, an estate tail general, which by our statute concerning entails, in force in 1807, was converted into a *fee simple absolute*. The words "shall die leaving lawful issue," as used in this clause, import, according to their settled legal sense, an *indefinite continuance of issue*, and thus create an estate tail in *real* and an absolute estate in *personal* estate. This was the established law of this state prior to the enactment of the revised statutes of 1830. (*Paterson* v. *Ellis*, 11 *Wend.* 259, *and cases cited by Savage, Ch. J.* 277–294.) The words "lawful issue," "child" and "children," are each words of procreation, and they are here used in reference to one particular person from whose body heirs are to come: there is, therefore, every requisite for the creation of an *estate tail.* (2 *Black. Com.* 114, 115.) The words "lawful issue," as used in this clause, are evidently words of *limitation*, and not of *purchase;* and so are the words "child or children," especially as they are all used of an unmarried person. (*Goodtitle* v. *Otway*, 2 *Wils.* 6. *Rex* v. *Greer*, 2 *id.* 322–4. *Parker* v. *Bowdoin*, 1 *Sumner*, 359, *and cases cited by Story, J.* 367–372. *Wheatland* v. *Dodge*, 10 *Metc.* 502. *Weld* v. *Wil*

liams, 13 *id.* 486.) The limitation in this clause to "the child or children" of Miss Mackaness, if one only, to him or her solely, and if more than one, to them equally, share and share alike, is in exact conformity to the first rule in the statute of descents of February 23d, 1786. (1 *Kent & Radc.* 44, § 3. 1 *R. L. of* 1813, *p.* 52, § 3. 3 *R. S.* 1*st ed.*, *App. p.* 48.) By the last clause of the first section of the same statute, (*supra*,) every person who, if that act and the former act of 1782 abolishing estates tail had not been passed, would have become seised in fee tail of any lands, &c., instead of becoming so seised, "shall be deemed and adjudged to become seised thereof in fee simple absolute;" and this provision operates on the estate tail as soon as it becomes vested in interest. (*Van Rensselaer* v. *Poucher*, 5 *Denio*, 35.) (13.) If the words "child or children" in the clause in question are to be construed as words of *purchase* and not as words of *limitation*, then the true effect of such construction of said clause—when the same is taken in connection with the ultimate limitation over, in the event of Margaret's dying without leaving a child her surviving, to her sisters Elizabeth and Mary, or their children—is not to cut down the estate in fee before given to Margaret to an estate for her life, but only to reduce the estate from a fee simple absolute to a *base* or *determinable fee*, liable to be defeated or determined by the happening of that contingency. It did not happen; on the contrary Margaret died, leaving a child, (Mrs. Chrystie,) whereby the estate in fee before given became or remained absolute and indefeasible. The clause in question is to be considered, not only in connection with the devise in fee to Margaret, with which the article begins, but more especially in connection with the limitation over to her sisters, which it immediately follows, and by which it was evidently suggested. When thus considered, the clause in question must be regarded as merely a mode of giving further expression to the original devise of the fee to Margaret, and as intended to exclude any design to disinherit her, in the event of her leaving a child or children her surviving. The first and second qualifying clauses, thus construed, create together a limitation over of the fee do-

vised to Margaret, to the sisters Elizabeth and Mary in the event described. Still further to show the leading purpose in the testator's mind, he proceeds, by the third and last of the qualifying clauses, to provide for the additional contingency of Margaret's dying without lawful issue, but not until *after* the death of her sisters Elizabeth and Mary, one or both of them. The true effect of the three qualifying clauses—supposing the words "child or children" not to be, in the sense of the law, words of *limitation*—therefore, is merely to reduce the estate in fee, first given to Margaret, to a base or determinable fee, liable to be defeated on the single event of her dying without leaving a child her surviving, but in the lifetime of her sisters Elizabeth and Mary, or of their children, or the child of one of them—in which event the inheritance is to go over in fee simple absolute to Elizabeth and Mary, or their children, as the case may be. The contingency by which the testator intended that the estate in fee simple absolute, first given to his daughter Margaret, should be defeated, viz. *her dying without leaving issue living at her death*, having never happened, but she having died leaving a child her surviving, her estate was thereby freed from its liability to be defeated, and became and remained absolute and indefeasible. It is the ordinary case of an estate in fee, with a valid limitation over, by way of executory devise, which becomes absolute and indefeasible by the non-happening, and the impossibility of its ever happening, of the event on which alone the limitation over is to take effect. (14.) If the clause in question, considered by itself or in connection with what precedes or follows it, can be construed as reducing the devise to Miss Mackaness to an *estate for her life*, or other freehold, then by virtue of the rule in *Shelley's case*, (in force at the testator's death,) she took under the subsequent limitation in this clause, to her child or children, an estate in *fee simple absolute*. (4 *Kent's Com.* 214–233. *Kingsland* v. *Rapelye*, 3 *Edw.* 1–21, *and cases cited by the vice chancellor*. *Barlow* v. *Barlow*, 2 *Comst.* 386. *Brown* v. *Lyon*, 2 *Seld.* 419.) In the application of the rule to the present case, it is unnecessary to decide

whether the limitation to the child or children of Margaret is in fee simple or in fee tail, for in the latter case it was turned by our statute into an estate in fee simple, while in the former she would take such an estate *per formam doni.*

II. Either of the constructions above proposed will effectuate the general intent of the testator, viz. that his daughter Margaret should have an estate in fee in the house and lot in question. Either of them is, therefore, to be preferred to a construction which defeats that intent; nor is either of them liable to any valid objections. (1.) There is no such repugnance between the devise in the beginning of the fourth article, of an estate to Margaret, *her heirs and assigns* forever, and the clause in question, as to require or justify the rejection of the preceding express devise in fee. The rule that when the latter part of a will is inconsistent with a prior part, the latter part shall prevail, as denoting the last intention of the testator, has no foundation in reason, and is never resorted to by the courts if it be possible to reconcile the two provisions with each other. There must be an entire incompatibility or repugnance between the two provisions, to justify the application of the rule. (*Sherret* v. *Bentley*, 2 *Myl. & Keen*, 155. *Sweet* v. *Chase*, 2 *Coms.* 73.) No such incompatibility or repugnance exists here; but, on the construction above given, the several clauses, in legal effect as well as in intent and design, may be reconciled with each other. (2.) If the will be found, on its true legal construction, to create an estate tail in Margaret, this does not militate against the general proposition on which the defendants insist, viz. that Margaret acquired, under the will, an estate in *fee simple absolute*, but furnishes a strong argument in support thereof, because by our statute such estate tail was turned into an estate in fee simple absolute. So, too, if by the law, as it stood at the testator's death, Margaret took, under the rule in *Shelley's case*, an estate in fee. Such a construction equally supports the defendants' claim. And in each of these cases the testator's general intent that his daughter Margaret should have an estate in fee simple absolute, is preserved and effectuated. (3.) The limitation over of the fee devised to Margaret, to her

sisters Elizabeth and Mary in fee, in the event of her dying without a child or children her surviving, supposing it good by way of executory devise, does not militate against the testator's general intent, as above insisted on. Such a limitation over of a fee on a fee, by way of executory devise, does not, either in the mind of a testator or in the sense of the law, cut down the estate of the first taker to a life estate; it still remains an *estate in fee*, and with all the attributes of a *fee simple absolute*—except that it is liable to be defeated or determined by the happening of the contingency on which the limitation over is to take effect. There are no words of description, nor any other words to be found in the clause in question, or in the fourth article, or in any other part of the will, indicating any intent or desire on the part of the testator to provide for the children of his daughter Margaret *as purchasers*, or in any other way than as her *heirs and representatives*. The testator's primary and general intent, that his daughter Margaret should take an estate of inheritance in the house and lot in question, is not contradicted by imputing to him the further intent, that on the happening of a specified contingency, her estate should determine, and the premises go to her sisters or their representatives. On the contrary, as she left a child her surviving, her estate, on this hypothesis, became absolute and indefeasible; and the testator's general intent is preserved and upheld.

III. Under and by virtue of the conveyance in fee, by Charles Ludlow and Margaret Thornton Mackaness his wife, of the 17th of June, 1816, stated in the pleadings and proved on the trial, Duncan Phyfe acquired an absolute estate in fee simple in the premises in question, which passed by his will, dated January 24, 1854, to the present defendants in the action.

IV. The defendants were entitled to judgment in their favor; and the judgment rendered on the trial of the action should therefore be reversed. and the complaint be dismissed with costs, and a suitable allowance for counsel fees to the defendants.

M. S. Bidwell, for the plaintiffs. I. The devise to the child or children of the testator's daughter, Margaret Thornton

Mackaness, (afterwards Mrs. Ludlow,) was a valid executory devise. (1.) If it had been a devise to any one else than her descendants, there would be no doubt of its validity; it would not be void as being upon too remote a contingency, nor as being repugnant to the estate given to her. It was not too remote, because it was to take effect, if at all, at her death. She must have had issue then if she ever had issue. It was, in this respect, totally different from a failure of issue, which might not take place at her death, but might take place at an indefinite future period. It was not repugnant to the estate given to her, because that was a defeasible estate; it is the ordinary case of an estate in fee, subject to an executory devise. The whole doctrine of executory devises is founded on the validity of a testamentary provision, by which an estate previously given in fee may be defeated and displaced on a contingency, and a new estate substituted in its place. This constitutes the distinction between an executory devise and a contingent remainder. (*Fosdick* v. *Cornell*, 1 *John.* 440. *Ex'rs of Moffat* v. *Strong*, 10 *id.* 12. *Jackson ex dem. Staats* v. *Staats*, 11 *id.* 337. *Anderson* v. *Jackson ex dem. Eden*, 16 *id.* 382. *Barker* v. *Barker*, 2 *Sim.* 249. *Sumner* v. *Partridge*, 2 *Atk.* 47. *Doe ex dem. Barnfield* v. *Wetton*, 2 *Bos. & Pull.* 324. *Waldron* v. *Gianini*, 6 *Hill*, 601. *Jackson* v. *Chew*, 12 *Wheat.* 153. 4 *Kent's Com.* 265, 268–278.) (2.) The fact that the gift over is to her child or children, instead of its being to a third person, does not render the executory devise ineffectual. It is not a limitation to which the rule in *Shelley's case* applies. It is not a gift to her heirs at law or to her issue, but to her *child or children.* These words, *prima facie*, at least, are words of purchase, not words of limitation; they are words to designate the person to take as devisee, not to denote the quantity of estate given. (*Sisson* v. *Seabury*, 1 *Sumn.* 257. *Jeffrey* v. *Honeywood*, 4 *Mad.* 398. *Goodright ex dem. Dorking* v. *Dunham*, *Doug.* 264. *Lees* v. *Mosley*, 1 *Yo. & Coll. Exch. Rep.* 606, 607. *King* v. *Becke*, 15 *Ohio R.* 561.) A fee simple having been given by the previous words, this provision would have been entirely nugatory, if not intended (according to the plain import of the

language) to give her child or children as devisees of the testator, independently of their mother and not as her heirs, an estate in fee simple. The testator gives it to her child or children; if one only, to him or her solely—if more than one, to them equally, to be divided between them, share and share alike; which shows that he intended them to take as devisees, and did not use the words as words of limitation. (*Tanner* v. *Livingston*, 12 *Wend.* 83. *Sisson* v. *Seabury*, 1 *Sumn.* 243. *Right ex dem. Shortridge* v. *Creber*, 5 *Barn. & Cress.* 866. *Gretton* v. *Hayward*, 7 *Taunt.* 94. *Lessee of Findlay* v. *Riddle*, 3 *Binn.* 139.) He also gives it to such child or children, and his, her or their heirs and assigns, not the heirs and assigns of his daughter. These superadded words of limitation show that it was his intention that the child or children should take as devisee or devisees; they were to be the new stock of inheritance; the limitation was to *their* heirs. (*Tanner* v. *Livingston*, 12 *Wend.* 93. 1 *Vent.* 232. 4 *Kent's Com.* 221. *Luddington* v. *Kime*, 1 *Ld. Ray.* 203. *Clerk* [*or Cheek*] v. *Day*, *Moor*, 593. 1 *Ld. Ray.* 205. *Fitzg.* 24. *King* v. *Melling*, 1 *Vent.* 232. *Carpenter* v. *Smith*, 3 *Keble*, 123. 4 *Kent's Com.* 221. *Lessee of Findlay* v. *Riddle*, 3 *Binn.* 139.) If the words "child or children" had been synonymous with the word "heirs," these superadded words of limitation would have been tautologous, and would have no effect. Another consideration in itself decisive is, that this gift to her child or children was to take effect, if his daughter should die before or after the testator's decease. To effectuate this purpose, it is absolutely necessary to construe these words as words of purchase, not words of limitation; this must have been the testator's intention; for in case of her death, leaving a child or children while the testator was living, such child or children could not have taken under this provision if these were words of limitation, but there would have been a lapsed devise. (*Rogers* v. *Rogers*, 3 *Wend.* 503, 513. *Doe ex dem. Turner* v. *Kett*, 4 *T. R.* 603. *Brett* v. *Rigden*, *Plowd.* 340, 345. *Goodright* v. *Wright*, 1 *P. Wms.* 398.) This is conclusive; it is impossible to construe these words as words of limitation, consistently with the

express declaration of the testator, that, in case of her death before his decease, her child or children (if she left any surviving him) should take the property in fee. If the effect of any one of these provisions, to render the rule in *Shelley's case* inapplicable, were dubious, yet such doubts cannot extend to all of them. At all events, the concurrence and joint operation of all of them, taken in connection and together, must incontestably prove the intention of the testator, which being a lawful intention must govern in this case, (*Ginger ex dem. White* v. *White*, *Willes' R.* 350, 351,) that if his daughter should leave a child or children at her death, such child or children should take an estate in fee. (3.) This construction agrees with the conclusion which any man of plain common sense would draw from the language of the will, and which the testator undoubtedly must have supposed and intended should be drawn. It harmonizes with, and is corroborated by, the corresponding provisions made by the testator in favor of the children of his other daughters, Mrs. Harvey and Mrs. Prowitt, in the first and second clauses of his will. The children of each of these daughters was to take the fee in the property in which their respective mothers had a life interest. If either of them died without issue surviving her, the property was given to the other daughters So it was in the case of Margaret Thornton Mackaness. It is obvious that it was the intention of the testator to put his three daughters and their respective children substantially upon the same ground.

II. It is clear, therefore, upon the whole view of the will, as well as upon a critical examination of the fourth clause, that Mrs. Chrystie, having survived her mother, and being the only surviving child, took, under the will and as the devisee designated by the description, "a child of Margaret Thornton Mackaness," a fee simple absolute in the premises in question.

III. The decision of the judge was, therefore, not erroneous.

IV. The question, what estate is given in the fourth clause to Mrs. Harvey and Mrs. Prowitt, or their children, does not fairly arise, and need not be determined. (1.) If Mrs. Ludlow had died without children, it might have been necessary to de-

termine that question, but as that contingency has not happened it seems idle to discuss it. Where there is a contingency with a double aspect, or in other words, where there is a valid limitation over in one contingency, and in case that contingency does not happen, there is an alternative limitation over upon another contingency; if the first contingency happens, it is immaterial whether the latter be valid or not; for its invalidity cannot affect the other limitation. (*Longhead d. Hopkins* v. *Phelps*, 2 *W. Black.* 704. *Crompe* v. *Barrow*, 4 *Ves.* 681, 686. *Crump d. Wooley* v. *Norwood*, 7 *Taunt.* 372. *Minturn* v. *Wraith*, 13 *Sim.* 52, 62. *Gower* v. *Grosvenor*, *Barnard. Ch. R.* 60. 1 *Pow. on Dev.* (*by Jarman*,) 401, *n.*) (2.) It is not admitted, however, that there is the least reason to doubt the validity of the contingent limitation in this clause to Mrs. Harvey and Mrs. Prowitt and their children, or that there is any difficulty in determining what would have been its legal effect. It clearly was not a limitation upon an indefinite failure of issue. It depended upon the double contingency of Margaret Thornton Mackaness dying unmarried and without issue surviving her, which could not have happened after her death. Although the court will construe the word *and* as synonymous with the word *or*, when necessary to effectuate the testator's intention, they will never do so when it will render the devise illegal or defeat such intention. (*Doe d. Baldwin* v. *Rawding*, 2 *B. & Ald.* 441. *Doe d. Everitt* v. *Cooke*, 7 *East*, 269. *Doe d. Dary* v. *Burnsall*, 6 *T. R.* 30, 34. *Jackson d. Burhans* v. *Blanshan*, 6 *John.* 54. *Sayward* v. *Sayward*, 7 *Greenl.* 210, 216. *Chapman* v. *Brown*, 3 *Burr.* 1634. *Fonnereau* v. *Fonnereau*, 3 *Atk.* 318.) But even if the word *or* had been used instead of the word *and*, there remains conclusive evidence that the gift over was not to be upon an indefinite failure of issue. The contingency mentioned is Margaret's dying *without leaving a child her surviving;* in which case there is a devise to Mrs. Harvey and Mrs. Prowitt, as tenants in common in fee, or if either of them shall at Margaret's death be dead, and shall have a child *then living*, then the devise is to *such child*, that is, the child living at Margaret's death. These circumstances

prove that the testator did not contemplate an indefinite failure of issue, but intended to provide only for a contingency at the time of Margaret's death. (3.) It is clear from these considerations that the estate given to Margaret would not have been an estate tail previous to the law abolishing such estates; and if this were at all doubtful, the court should presume, in case of a will made after such law was in force, that the testator did not intend to create an illegal estate. (*Rogers* v. *Rogers*, 3 *Wend.* 503, 514. *Tanner* v. *Livingston*, 12 *id.* 93, 94. *Lethiullier* v. *Tracy*, 3 *Atk.* 797.) (4.) Upon the whole, although the will was not drawn with artificial nicety, there is no difficulty in ascertaining the meaning of this clause and determining its effect, so far as it may be necessary to do so in this cause. The testator gave his daughter Margaret Thornton Mackaness an estate in fee simple, subject to an executory devise in fee simple, to any child or children who might survive her; or if she had no such child, subject to an executory devise to her sisters, if living, or (if either of them should be dead, leaving a child or children then living,) to such child or children. There were, therefore, two contingencies contemplated and provided for by the testator, and if either of them happened, the estate in fee devised to his daughter was to cease, otherwise it would be absolute. The first contingency has happened. The testator's daughter Margaret has died, leaving a child who survived her; that child, under the executory devise in her favor, then took an estate in fee simple absolute, and she and her husband became entitled to the immediate possession of the lands. As this was withheld from them by the original defendant, they brought this action, and are entitled to judgment.

V. The judgment therefore should be affirmed, with costs.

ROOSEVELT, J. The plaintiff, Mrs. Chrystie, who was the granddaughter of Thomas Mackaness, deceased, claims under a devise or gift, in her grandfather's will, to be the owner of the house and lot known as No. 192 Fulton street, lately occupied by Duncan Phyfe, deceased. Phyfe died in possession of the premises in the year 1854, holding under a deed in fee, containing

full covenants, executed to him in 1815 by Mr. and Mrs. Ludlow, the father and mother of Mrs. Chrystie the claimant. The case presents a question of title merely, depending for its determination, not on any disputed fact, but on the construction to be given as matter of law to Mackaness' will, which was made and took effect long prior to the adoption of the revised statutes, and which therefore is to be interpreted, if necessary, according to the principles of the old system. Mackaness it appears had a wife and three children, all daughters. Two of them, Mrs. Harvey and Mrs. Prowitt, had husbands; the other, Margaret, although she married afterwards Mr. Ludlow, was at the date of her father's will a single woman. As to the two married daughters, he of course knew the circumstances of their husbands; as to the third, the unmarried one, he was left to conjecture, but entertained, it would appear, higher hopes and greater faith.

Thus situated in his family, Mackaness about fifty years ago made his will, dividing his estate into three allotments. To Mrs. Harvey, one of his married daughters, he gave his house in Front street "during the term of her natural life," with remainder in fee to her children, if any, and if none, to her sisters or their children; subject to the husband's use, if surviving, "during his natural life." To Mrs. Prowitt, the other married daughter, in whose husband's affairs he seems to have had a little less confidence, although he made him a trustee, he gave the income of his dwelling, brewhouse and malthouse in Barley street, "for her own sole and separate use," "during the natural life of his said daughter," with remainder in fee to her children or her sisters, as the case might be; but with no reserved benefit in favor of her husband. These provisions, thus briefly stated, in respect of his two married daughters, are carried out with perfect clearness and with great particularity and minuteness of detail, in the first and second articles of the will. In the next he gives his homestead in Orange county, with all the horses, cattle, &c. to his wife and unmarried daughter during their joint natural lives and the life of the survivor; and if his said daughter should be the survivor, then (on her mother's

death) to her and "her heirs and assigns forever"—in other words, giving her as to the farm a conditional fee, determinable if she died before her mother.

In the 4th article, still carrying out the distinction between Margaret and the other daughters, he gives her the house now in controversy in Partition street, to her and to "her heirs and assigns forever," with this qualification, however, that if she died "unmarried and without leaving a child her surviving," (as she left a child, Mrs. Chrystie, born in wedlock, this condition is of no direct importance,) then all her share of his estate, both real and personal, was to go to her sisters or their children, as the case might be. Here then again was a conditional fee, depending upon Margaret's first having, (which could only be if she married,) and then leaving, a lawful child. Unlike her sisters, whose interest in their allotments was in every event merely for life, and could in *no event* be raised to a fee, her estate was in perpetuity, with full power to "assign," that is (for such is the legal meaning of the word "assigns,") to convey, either by will or deed, to whom she pleased, in fee simple, with no possibility of being reduced to a mere life estate, except in the *one event* of her leaving no child. Her *sisters'* children were to take in remainder as direct devisees or legatees of their grandfather; *her* children, if at all, as "heirs" of their mother, and of course (like heirs in any other case of ownership in fee) subject to their mother's acts in her lifetime. All persons, whether lawyers or laymen, at all conversant with real property, understand that where a piece of land is given or conveyed to a man and his heirs, or his heirs and assigns, he may dispose of it in his lifetime or at his death, to the exclusion of his heirs, whether descendants or collaterals. The use of the term assigns by the testator in the present instance shows that he so understood the law, and that he so intended While withholding expressly the power to sell, as to the fee, from the two married daughters, he gave it as expressly to his unmarried daughter Margaret. When therefore, as Mrs. Ludlow, she conveyed in fee to Mr. Phyfe, she did nothing but what her father contemplated and permitted; and Mr. Phyfe, on his part, incurred

no risk of dispossession, except what resulted from the possibility that all the children of Mrs. Ludlow might die before her —a risk which he took the precaution to guard against, in some degree at least, by requiring Mr. Ludlow to execute a warranty of title. But Mrs. Ludlow, as already stated, did marry, and at her death did leave a child. Had the will, therefore, stopped at this point, there could be no question—none at least of any serious difficulty—and no suit it is probable would have been thought of. The birth and survivorship of Margaret's child, (now Mrs. Chrystie, one of the plaintiffs,) instead of raising up, as it has done, an adverse claim, would have been the very means prescribed by the will for perfecting the title of Margaret's grantee.

The 4th article, however, does not stop here. The draftsman was a lawyer, and although not perfectly artistic in his work, he knew that thus far he had assumed that Margaret, the devisee, would live to take her father's bounty, and that as the law then stood, if the assumption failed and she died before him, her children, even if she left any, would not take in her stead, but be excluded on the ground of its being a lapsed devise. True, the testator in such case might make a codicil; but testators are apt to forget. It was safest therefore, or was supposed to be, to anticipate such a possibility and provide for it in the will. He had already, as we have seen, made all the provision he desired for the case of her taking the property, after him, and then dying herself, (the usual course of nature.) giving it in that case to her children, if any, through her, and as her heirs at law. He now simply adds, that if she died before him and left children living at his decease, they should take in fee that which had been intended for their mother. But the draftsman, unfortunately, in expressing this idea, tempted no doubt by the love of more sonorous periods, used the expressions "if my said daughter Margaret Thornton Mackaness shall die, either before or after my decease, leaving lawful issue, then I do give, devise and bequeath the part and parts, share and shares, of my real and personal astate by this my will given, devised and bequeathed to her, unto such child or children, &c. their heirs and assigns forever," &c. Literally, this language, it

must be admitted, applies to the case of Margaret's death leaving issue, whether before or after her father's. But so applying it, the result would be not to modify but to nullify the provisions already made; and in the very same sentence, to convert that which in a certain event he had intended to be, and which in the ordinary course of things would be, an absolute fee simple, into a mere estate for life, and which in no event could be of longer duration than life.

In the interpretation of legal instruments, as of other writings, it is our duty to reconcile them if practicable. An author, whether it be of a book or a will, is not to be presumed to intend, especially in the very same sentence, to contradict himself. This rule is well established both upon authority and common sense. If any thing in this will be clear, it seems to me, it is clear that the testator did not intend that his daughter Margaret, as the plaintiffs argue, should take a mere estate for life and nothing more. She was in some event certainly to take a fee. How then, it may be asked, are the expressions, "either before or after my decease," just quoted, to be reconciled? They are, I conceive, to a great extent surplusage; they are as much as to say, I have already, in case of my daughter Margaret's death *after me* leaving issue, given her portion to them as her "*heirs*;" and I now, in case of her death *before me* leaving issue, give it to them in like manner, as far as may be, as her *substitutes*, so that "if she shall die either before or after me leaving issue," such issue, as heirs or as substituted devisees, will take her portion; if in the character of heirs, then subject, like other heirs, to their parent's disposition; if as substitutes, then subject, like other immediate devisees in fee, to no disposition but their own. The primary, and as it seems to me the only, object the testator had in view in the words just quoted, was to meet the possible event of his daughter's death before him, to prevent the lapse which in that event, as the law then stood, would otherwise have followed, and to give effect to a dictate of nature, so strong and universal, as to induce the legislature to interpose and to make a general provision in favor of issue, in all cases where the immediate object of a testator's

bounty, being a descendant, dies before the testator himself, but leaves issue who survive the testator. (2 *R. S.* 66, § 52.)

The will in question, although somewhat inartificial, was obviously drawn by a lawyer. He knew this rule of the old law, in full force when the instrument was framed. He knew that Miss Mackaness, whether she died before her father or after him, must either die childless or leave issue. He had provided for both contingencies, whichever of them should happen after the testator's death; giving his daughter not a life estate but an estate in fee simple, defeasible if she left no issue, and indefeasible if she did. Why then should he provide for one of the same two contingencies again? Why, when he had just declared that in that precise contingency she should take an estate "to her and her heirs and assigns forever," why, I say, is he to be presumed to have intended that in that precise contingency, and every other, she should take, as the plaintiffs contend, an estate "substantially similar" to that of her sisters; namely, for life only? If the provisons for all the three daughters were to be substantially similar, why were such great pains taken to distinguish them? It is palpable that the descendants of Margaret, in some event, were to take as "her heirs;" whereas, by the plaintiffs' construction, they could take as heirs in no event. It is equally palpable that she was in some event to have the power of "assigning" the fee; whereas, if only a life tenant, her conveyance would pass only a life estate, and that, in the language of the law, merely *pour autre vie*. The whole argument of the plaintiffs' counsel proceeds upon the assumption, as stated by himself, that for each of the other daughters and their children he (the testator) made provisions substantially similar to those in regard to his daughter Margaret and her children; whereas the whole will proceeds upon the idea that the provisions in the two cases were to be substantially different. It is only necessary to read the will—the whole will, and not the mere detached parts relied on by the plaintiffs—to sustain the position that all the sisters were not to be placed on the same footing. "This construction (I adopt the words of the plaintiffs' third point) agrees with

the conclusion which any man of plain common sense would draw from the language of the will, and which the testator undoubtedly must have supposed and intended should be drawn." He could not have imagined—no man of common sense could have imagined—that the words "to her and her heirs and assigns forever" would be construed as intended in no event to give a fee, and in every event to give only a life estate. He knew, of course, that his daughter Margaret must die, either with or without issue—that there was no other possible alternative in the nature of things; that therefore, if "her heirs and assigns," as such, were not to take if she left no issue, and were also not to take if she left issue, they were not to take in any event. And yet he had expressly given—and that in contradistinction to his other daughters—the house in question to Margaret "and her heirs and assigns forever." He had given her a fee of some kind. His language to that extent, whether tested by the professional or by the common understanding, is perfectly clear; while to his married daughters it is undisputed that he gave only life estates. How then can it be said as the plaintiffs' counsel contend, that "it is obvious that it was the intention of the testator to put his three daughters and their respective children substantially upon the same ground?" Is a mere life estate, with no power of appointment by deed or will, substantially the same as a fee? Or is an estate which certainly in some event was to go "to the testator's daughter and her heirs and assigns forever," substantially the same as an estate which in no event was to be held by the donee, or to be subject to her control, for a longer period than "during her natural life?" According to the plaintiffs' fourth point, the devise to Margaret was "an estate in fee simple, subject to an executory devise in fee simple to any child or children who might survive her; or, if she had no such child, subject to an executory devise to her sisters if living, or (if either of them should be dead, leaving a child or children then living,) to such child or children." The answer to this position, as already stated, is that it involves the absurdity of a fee, which in no event could go to the donee's "heirs" as such, or to the donee's "assigns"—a fee

unknown either to common law or common sense—a fee in direct contradiction of the ordinary as well as legal meaning of the terms which create it.

I have not gone into the technical matters which have been discussed by counsel, for the reason that assuming the views of the plaintiffs in regard to them to be correct, they do not affect the conclusion at which I have arrived, as to the intention of the testator; the guide which both parties very properly profess to follow in determining the construction to be given to his will.

In the recent case of *O'Reilly* v. *Sempill*, decided on appeal in 1855 by the court of last resort in England, the testatrix, in one codicil, gave the whole residue of her property to her cousin, "Lady Sempill and her heirs and assignees;" and by a subsequent codicil, reciting that there was no prospect of her cousin having a child, "deponed and bequeathed as her successor," a niece named O'Reilly, "to succeed the said Right Honorable Lady Sempill in all her (the testatrix's) landed property, &c." The question was, says the reporter, whether the fee given to Lady Sempill by the first codicil was cut down to a life rent by the second. *Held* by both courts that it was not. The lord chancellor said the case "admitted of no reasonable doubt;" that Miss O'Reilly was merely substituted in the place of Lady Sempill's "heirs," and like them would take on her death, if Lady Sempill should "do no act to defeat the destination of the property;" that the devise over was "a mere *spes successionis* in Miss O'Reilly, which might or might not be of much value; that it was no doubt always of some value, but did not prevent Lady Sempill from exercising all the rights of ownership with regard to the property." Lord Brougham said he had "no doubt as to the case, any more than his noble and learned friend." Lord St. Leonards added that he agreed with the lord chancellor and Lord Brougham, "and had no doubt that the court below came to a correct conclusion." "The estate (by the 2d codicil) was not removed out of Lady Sempill; the fee was not cut down in that way." What a child, had there been one, would have taken as heir, was to go to Miss O'Reilly "as the successor in the place of the child," and "subject to

the disposition of Lady Sempill herself." (2 *Macqueen's Rep.* 288.) The result is, that Mrs. Ludlow took an estate in fee defeasible by law in the event of her dying before her father, and defeasible by will in the event of her dying after him, leaving no issue. Having survived her father, and having left issue, her estate in fee both vested and became absolute in her, and as a consequence in her grantee, Mr. Phyfe.

Judgment should therefore be entered for the defendants.

WHITING, J. concurred.

CLERKE, J. (dissenting.) I. The rule that, in the construction of wills, they are to be expounded so as to pursue as far as possible the intention of the testator, is, in our law, universally recognized. In the language of Coke, the intention is the pole-star to guide the judges; but, it is also conceded, with equal unanimity, that this intention must be collected from the language of the instrument—not from any extraneous reports and evidence concerning it, except in the instance of a latent ambiguity; and, where it does not clearly and with reasonable certainty disclose the intention, the court must have recourse to the rules of strict legal interpretation, and must be exclusively guided by them. The construction must not depend upon probabilities, upon the private belief, the conjectures, or the speculations of the judges, however plausible or ingenious, or however conducive to a benignant result; but it must be derived from the instrument itself—not from a fragment, but the whole of it; so that the words may stand together, without repugnance or contrariety. Does the will now before us, taken as a whole, clearly and satisfactorily disclose the intention of the testator in relation to the interest devised to his daughter Margaret Thornton Mackaness, afterwards Mrs. Ludlow, so as to dispense with the necessity of conjecture or speculation?

If it is affirmed that the employment of the technical words of inheritance, in the first clause of the article, is conclusive proof of his intention, may it not be affirmed with equal if not greater force, that the three limitations over, in language

equally positive, disclose quite a contrary intention, with the additional advantage that they are subsequently declared?

It is again affirmed that he distributes other real estate among his daughters, who were married, *in express terms during their natural lives*, while he makes use of words of inheritance only in the devise to his daughter Margaret. But, if by giving to the limitations over, in the fourth article, their full force, the same interest would be given substantially to his daughter Margaret, that he has confessedly given in other articles to his other daughters—that is a life interest—may it not be affirmed, with quite as much plausibility, that this discloses an intention to place his three daughters, and their respective children, on the same ground, and that it was nothing but the technical verbosity or the obtuseness of his lawyer, which caused any variation in the language of the will.

I confess that I cannot discover any thing in the diction or tenor of this instrument to afford me any unquestionable assurance of the intention of the testator, respecting the devise to his daughter Margaret. I may form a belief; I may surmise; I may indulge in conjecture approximating to the truth; but this the law, for the wisest reason, does not permit—for the same reason, indeed, that it leaves as little as possible in the administration of justice, to depend upon the caprice or mere speculation of its dispensers and interpreters. Abandoning, therefore, any attempt to ascertain the intention of the testator, independently of the strict rules of legal interpretation, we must confine ourselves, exclusively, to the light which those rules afford.

What, then, according to established rules of construction, and to the principles of the common law existing at the time of the death of the testator, was Mrs. Ludlow's interest in the property in question?

II. I differ from the plaintiffs' counsel with regard to the precise nature of the limitations over. I do not think they create an executory devise. An executory devise, limited on any intervening freehold estate, must be limited on a fee, vested in a person, and to be vested in another by contingency. If the future estate is limited on a life estate, it is not an executory

devise, but a contingent remainder. The fee in an executory devise is determinable in the first taker, and on a defeasance of the fee, or the happening of the contingency, the executory devise takes place ; but, if the contingency should not happen, the fee may become absolute in the first taker. As, where a testator devised to A. and his heirs forever, and if he should die without issue in the lifetime of B., then B. to have the lands, to him and his heirs forever. In this case A. took a vested fee simple, the limitation over to B. being good as an executory devise, to take effect on A.'s dying without issue, in the lifetime of B. There is another kind of executory devise, as where the fee does not pass at once by the devise, but until the contingency happens, descends to the heirs of the devisor. Thus a devise to the first son of A. when he shall have one, is good as an executory devise ; and the inheritance, in the mean time, descends to the heirs of the devisor. The first, however, is the only one that can be regarded as analogous to the case now before us. According to the first definition and example, it will be readily perceived, if the contingency should not happen, that is, if A. should die leaving issue, or should die without issue after the death of B., the estate goes to the heirs of A. *by descent*, and not by virtue of the devise, or, to speak more technically, *by purchase*. The fee becomes absolute in the first taker, in the person of his heir.

Now, if any effect is to be given at all to the limitations over, in the will before us, (and of course, on the theory of the plaintiffs' counsel, effect must be given to them, else his whole argument falls,) the fee could never become absolute, under any circumstances, in the first taker or his heirs, (as heirs.) These limitations provide, in substance, that if Miss Mackaness should die unmarried, *without leaving lawful issue*, the estate shall go to her sisters, their heirs and assigns forever ; if she should die *leaving lawful issue*, then to such child or children, his, her or their heirs and assigns forever ; and in case Miss Mackaness should die without lawful issue, and if at her death her sisters should not be living, the will provides that the estate shall go to the children of the said sisters, their heirs and assigns forever. By no possibility, therefore, by virtue of this

devise, if these limitations are not to be totally rejected, could a fee vest in Miss Mackaness; and, without this, without the possibility of the fee becoming absolute in the first taker, as I have shown, the limitations over cannot be legally denominated executory devises. The law is reluctant to construe any future estate to be an executory devise, that can fairly be deemed a contingent remainder. I think, therefore, the counsel for the plaintiffs mistook their ground in insisting, as the basis of their argument, that the devise belongs to that denomination of future estates.

III. But does it necessarily follow that these limitations over are to be held as ineffectual, and as belonging to no description of future estates? Are there no legal principles which can determine the character of this devise, in the absence of any light, which the will itself satisfactorily affords in relation to the testator's intention? It is maintained by the counsel for the defendants, that by the first sentence of the fourth article of the will, Miss Mackaness was invested with an absolute and indefeasible title in fee. It gives the estate to her, "*her heirs and assigns forever.*" These are clearly and undoubtedly words of absolute inheritance; and if no words of limitation over, no words of qualification or restriction followed, her title would have been indisputable, and her power of alienation would have been complete. But I think the entire fallacy of the defendants' argument rests upon the assumption that these words are to be taken in their unqualified sense, unaffected by the subsequent provisions of the article. It is a rule of construction, that it be made upon the entire instrument, and not upon disjointed parts of it. In a deed, doubtless, if there are two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected; but with regard to a will the rule is different; for if there are two such repugnant clauses, the latter shall stand. Every word of a will, not inconsistent with the general intent, ought to have effect given to it; but if two passages are totally inconsistent, the last must prevail. Indeed, ambiguous words in one passage cannot control another passage which is unequivocal. But is the lan-

guage of the limitations over in this case equivocal? On the contrary, it is perfectly explicit, quite as much so as that of the first passage. True, in the first passage, the testator gives and devises this property to his daughter Margaret Thornton Mackaness, "*her heirs and assigns forever;*" but it is equally true, that he gives, devises and bequeaths the same property to his daughters Elizabeth Harvey and Mary Prowitt, "their heirs and assigns forever," in case his daughter Margaret should die unmarried without lawful children; and if leaving lawful children, he gives and devises it to such children, and to make it still more certain that her heirs should not have it as her representatives, he gives and devises it to the children of his daughters Mrs. Harvey and Mrs. Prowitt, in case Margaret should die leaving no lawful children, and if at her death Mrs. Harvey and Mrs. Prowitt should be dead. So that, if it is insisted that absolute effect must be given to the words of inheritance, without reference to what follows, it may be insisted with much greater force, that absolute effect must be given to the limitations over without reference to what goes before. It is a mistake to suppose that *the mere employment of the ordinary technical words of inheritance, peremptorily and positively imparts a fee, in defiance of subsequent words of qualification and limitation.* (*Bradstreet* v. *Clarke*, 12 *Wend.* 602.) In such case, the words of inheritance require something additional, imparting a power of absolute dominion and alienation, to countervail the effect of the subsequent words. This has no doubt been required in order to show indubitably that the testator was not mechanically using words, employed technically by his legal adviser, of the full import of which he was not sufficiently aware, and of which he was not likely to be aware. We shall find this satisfactorily illustrated in *Jackson ex dem. Brewster* v. *Bull*, (10 *John.* 19.) B. by his will, after devising a certain lot of land to his son Moses, *his heirs and assigns forever*, declared as follows: "in case my son Moses should die without lawful issue, the said property, *he died possessed of*, I will to my son Y. H." There the limitation over was considered void, not however *because the first clause unqualifiedly imported an absolute fee*

independently of the subsequent clause, but because the words "*died possessed of*" imported an absolute power of alienation, and therefore, *and not otherwise*, the limitation over was repugnant. The court, in their opinion, refer to the case of *The Attorney General* v. *Hall*, (*Fitzg.* 314,) to show that the words "died possessed of" implied a power of alienation by the devisee; and it necessarily follows, that without these words or some similar words, the mere naked words of inheritance would not imply any such power, where there was a limitation over inconsistent with these words. The court further remark, "that Lord Hardwicke has given his sanction to the accuracy of that case, and to the authority of that decision, (1 *Ves.* 9,) and the supreme court of Massachusetts in the case of *Ide* v. *Ide*, (5 *Tyng*, 500,) have made a similar decision in a like case, upon the same authority. In that case, after an absolute devise of real and personal estate to the son, the will adds, that if he should die and leave no lawful heirs, *what estate he shall leave* to be equally divided, &c." The limitation there was held to be repugnant and void; *though it was admitted, that without that clause the words "what estate he shall leave," it would have been good as an executory devise.*" This principle is fully recognized in the several cases arising out of the construction of Lord Sterling's will, in the supreme court and court of errors of this state, and in the last of those cases (*Jackson* v. *Robins*, 16 *John. R.* 537,) in the court of errors, the chancellor, in his opinion, reviews the case of *Jackson* v. *Bull*, and the cases there referred to, clearly confirming the principles, and recognizing the distinctions which those cases advance. The case of *O'Reilly* v. *Sempill*, (2 *Macqueen's R.* 288,) cannot be considered analogous to a case like the present, where the words of inheritance are placed in opposition to *limitations over*, couched in the strict terms of the common law. That was a Scotch case, decided on principles of a jurisprudence different from ours or that of England, on appeal to the house of lords. It decides that, where by a codicil of the will of the testatrix, an estate in fee simple was constituted in A., a subsequent codicil merely saying that B. should be the *successor* of A. should not cut down into

a life rent the fee simple of A. "*Merely saying that B. should be the successor of A.*" is a very different thing from giving and devising the estate to B., her heirs and assigns forever, on the death of A., whether A. should die with or without issue. Besides, such a decision in the house of lords cannot be of much importance here, if it contravenes all that has been held, as law upon the same subject in our own courts.

While, therefore, I deny that the limitations over, in this will create an executory devise, yet I am of opinion that Miss Mackaness, afterwards Mrs. Ludlow, took no absolute fee in the estate, notwithstanding the words of inheritance in the first clause of the article; that those words are divested, by the subsequent clauses, of their usual efficacy, and that the limitations over reduced her interest to an estate for life; and, at her death, an absolute fee vested in her daughter, Mrs Chrystie.

With regard to the point urged by the defendants' counsel, that the words, "shall die leaving lawful issue," import necessarily an indefinite continuance of issue, thus creating an estate tail, it is clear that the gift over was not to the issue of Miss Mackaness, merely in their capacity as her inheritors, but as devisees of the testator—not as her representatives or successors, but as his beneficiaries —not as heirs, but as original devisees; for the gift was to take effect, whether his daughter should die before or after his decease, and therefore, if there were no other objection, the rule in *Shelley's case* could not apply, nor could the estate have been considered an estate tail.

I am of opinion that the judgment of the court below should be affirmed, with costs.

Judgment reversed.

[New York General Term, September 8, 1856. *Roosevelt, Clerke* and *Whiting*, Justices.]

Ely *vs.* Spofford & Tileston.

The defendants having a claim against the United States government, for the refunding of duties erroneously collected of them, upon molasses and sugars imported by them, the plaintiff proposed to recover and cause any excess of duties so paid, to be refunded, upon his receiving for his services and expenses one half of the same, or, at the option of the claimants, a reasonable compensation to be afterwards agreed upon; he agreeing to save the defendants harmless "from all costs and liabilities to costs," and to charge his commission only "on whatever sum or sums of money he might recover for them." The defendants, among others, agreeing to the plaintiff's proposal, they signed a stipulation to that effect, writing opposite to their signatures, however, the words "not to interfere with any other arrangement already made." The defendants had previously employed D. & O. to prosecute the same claim, who were then actually engaged in the business, and whose influence and exertions contributed largely to the result. The claim having been allowed, and a large sum of money refunded to the defendants: *Held*, that the plaintiff was not entitled to recover fifty per cent upon the amount refunded by the treasury, with interest and without deduction; and that it was erroneous to charge the jury that, in fixing the defendants' liability, they were not to take into account the amount paid by the defendants to D. & O. who were previously employed to prosecute the claim.

THIS was an action to recover compensation by way of commissions on duties refunded to the defendants, upon importations of sugar and molasses. The complaint averred that the defendants had paid and were paying large sums of money, exacted under color of the tariff act of 1846, by the collector of the customs, for duties on sugar and molasses by weight and measure, and without allowance being made for leakage or drainage on the voyage of importation, or for weight of casks That in October, 1848, the defendants retained the plaintiff to obtain a just decision by some competent tribunal of the United States of the right of the defendants to have an allowance made for the loss of weight by leakage and drainage, and for weight of casks, and to have refunded to them all excess of duties which had been illegally exacted from them, or which they might be required to pay within two years thereafter, and induced and requested the plaintiff to take the risk and bear all the expense of suits and proceedings to be adopted by him for the purpose, saving the defendants harmless therefrom.

and, in consideration therefor, agreed to allow the plaintiff a commission of fifty per cent of the amount refunded. That the plaintiff caused proper forms of proceeding to be adopted for protesting against such exactions, and procured the questions of fact and law involved in said exactions to be prosecuted, proceeded in and argued in the proper courts of the United States, and saved the defendants harmless from all costs, &c. So that by reason of the plaintiff's services and expenditures, judgments were rendered that such exactions were illegal and ought to be refunded, whereby the defendants were allowed and refunded duties amounting to $30,000 and upwards, whereby the plaintiff was entitled to $15,000. That the defendants have not paid, &c. Judgment was demanded for $15,000, interest and costs. The complaint averred a second cause of action for work, labor and services generally, in procuring the refunding of duties. The answer denied any retainer of the plaintiff, except so far as was contained in a paper writing which the defendants, together with other merchants in the city of New York, at the request of the plaintiff, signed, and which was set forth as follows: "John Ely, of the city of New York, is in the belief that the undersigned, importers of foreign merchandise, have been overcharged by the collector of the customs, through an erroneous calculation of the amount of the duties payable under the tariff act of July 30th, 1846, and he proposes to recover and cause any excess of duties so paid to the government of the United States to be refunded.

We hereby severally authorize the said Ely to recover from the treasury of the United States any duties or excess which have been or may be illegally exacted of us by the collector or other government officer; and on whatever sum or sums of money he may recover for us, we severally agree to pay him the one half of the same, or, in case the undersigned should prefer, such reasonable compensation as shall be hereafter agreed upon, or shall be fixed by referees, to be mutually chosen for that purpose. It is expressly understood that we are not to be called on to pay any part of the expenses which may arise in prosecuting such claim or claims, the said Ely having no au-

thority to make us liable for the payment of any moneys in pursuing these claims, unless we may individually, each in his own name, and not for the other, give him such special authority.

The condition on which this power is granted, is that the said Ely will give his attention to the prosecution of our claims, and pursue the same with diligence. This power is confined to importations under the tariff act of July 30th, 1846, already made, and to such as may be made within two years from this date. *Not to interfere with any other arrangement already made.* New York, October 13th, 1848.

SPOFFORD, TILESTON & Co."

The answer averred that the plaintiff at the same time signed a paper, which he delivered to the defendants, and which formed a part of the agreement, whereby he bound himself to bring one or more suits to test the legality of the said exactions, &c. Denied specifically the allegations of the complaint that the plaintiff caused proper forms of protest to be adopted, or procured the questions of fact and law to be proceeded in, &c., or saved the defendants harmless from all costs, &c.; or that by reason of the plaintiff's services or expenditures judgments were rendered or duties refunded to the defendants. It also denied that the plaintiff was entitled to commissions, &c. as claimed. Averred failure of performance by the plaintiff of his part of the agreement. And that before the signing of said paper writings with the plaintiff, the defendants had employed Earl Douglass and Henry Ogden to prosecute the business of procuring a return to the defendants of the duties which had been illegally exacted from them under the act of 1846, on their importations of sugar and molasses; that in October, 1848, and long before, said Douglass and Ogden were prosecuting said business, of which the plaintiff had notice. The answer averred on information and belief that the plaintiff intended, under said agreement, to take proceedings to establish the principle that duties were properly chargeable only on the net cost of importations of sugar and molasses, and not on the invoice value; that if he commenced any suit it was for this pur-

pose only, and that he failed in establishing such principle; that the moneys refunded to the defendants were so refunded in consequence of decisions not procured by the plaintiff, or at his expense, &c.; and that the defendants in procuring such refunding had paid large sums of money, of which the plaintiff had notice. The defendants denied the second alleged cause of action specifically as averred. The reply denied the averments of new matter in the answer. The issues thus joined were tried before Mr. Justice MORRIS and a jury, September 15th, 1853.

The leading facts established at the trial were as follows: In 1848 the defendants and other importers claimed to be entitled to a return of duties exacted by collectors of customs, under instructions of the treasury department, on importations of sugar and molasses, on *deficiencies in weight and measure occasioned by drainage and leakage, during the voyage of importation*, and employed Earl Douglass and Henry Ogden to prosecute their claims before the treasury department, in congress, or at law, agreeing to give them, as compensation, one-third of the amounts recovered. The contract with Douglass and Ogden was signed by the defendants and 181 other firms, in February, 1848. Douglass and Ogden entered on the performance of this contract, employed George Evans, Edward Curtis and others, and on behalf of the defendants and others, made a direct application for return of the duties in question to the treasury department—Mr. Walker being then secretary of the treasury—upon claims of Jonathan Thompson and Joseph Foulke. These claims were before the department in March, 1849, and were referred by Secretary Walker to the comptroller of the treasury for examination and report; he reported in favor of the claimants, on the 16th of April, 1849, after Mr. Meredith had become secretary of the treasury. Mr. Meredith approved the report of the comptroller, May 1, 1849, and decided in favor of refunding the duties. In October, 1848, the plaintiff solicited the defendants to sign a paper authorizing him to recover from the treasury of the United States any duties, or excess of duties, which had been illegally exacted of them by the collector, and agreeing to pay him one half

of whatever sums he might recover for them, &c.; he putting them to no expense. The defendants objected to signing, on the ground of having signed a previous contract to other parties; the plaintiff said "he must have the *name of the house*, as it was one of the largest houses engaged in importing sugar and molasses, whether he was paid or not." The defendants agreed to, and did, sign, with the reservation, "*not to interfere with any other arrangement previously made.*" Simultaneously with the above contract, the plaintiff signed a writing, obligating himself to bring one or more suits to test the legality of the exactions of the treasury department, and to save the defendants harmless from expense, &c. A suit was commenced in the United States circuit court at Baltimore, in November term, 1848, by F. W. Brune and others against Wm. H. Marriott, collector of the port of Baltimore, to recover duties on deficiencies of importations of sugar and molasses. This suit was prosecuted by F. W. Brune & Sons, and at their cost and risk. The plaintiff offered to prosecute the suit, which was declined. But he assisted in preparing evidence, &c., and by agreement with Brune was to be regarded as having "instituted" it, and was to have the advantage of it in his business. The Brune suit was decided in favor of the Brunes, by Ch. J. Taney, April 30, 1849. This decision was contemporaneous with the action of Secretary Meredith approving the report of the comptroller of the treasury; but said report and the approval thereof were independent of that decision and of any proceedings of the plaintiff. Mr. Meredith, on the 13th of May, 1849, after approving said comptroller's report, and after the decision of *Brune* v. *Marriott*, revoked his decision of May 4, 1849, in favor of the importers, and decided against allowing the claims. This action was wholly independent of the suit of Brune, and of any proceeding of the plaintiff. The plaintiff made numerous applications to the secretary of the treasury, after the decision of *Brune* v. *Marriott*, to induce him to allow claims for duties, &c. "in conformity with the decision of the court in that case;" all of which were unsuccessful. The secretary of

the treasury refused to acquiesce in that decision, or adopt it as the rule of construction of the department, on the ground that it did not present all the facts necessary for the decision of the principle involved in the claims of the importers. The case of *Brune* v. *Marriott* was carried to the supreme court by writ of error. Pending the appeal in the Brune suit—independently of it, and after the refusal of the secretary of the treasury to acquiesce in it, and his announced determination not to acquiesce in it, even if affirmed by the supreme court—Douglass and Ogden, in prosecution of their contract with the defendants, procured a suit to be instituted and prosecuted in such manner as to secure a decision upon the principle involved. on all the points taken by the secretary of the treasury. This was the suit of *The United States* v. *Southmayd*, brought in the southern district of New York, and was the only suit in which the "principle involved" was presented. By the efforts of Douglass and Ogden and their counsel, the case of *United States* v. *Southmayd* was expedited, tried, and after a verdict for the defendant, a writ of error taken, and the cause placed on the calendar of the supreme court, a preference given to it, and the cause argued, all between October, 1849, and May, 1850. The plaintiff had no connection with the last mentioned suit or any proceedings therein. Had it not been for these special efforts, the case would not have been reached, in the ordinary course, for two years. It was 250 on the calendar. The Brune case was 207. After the above arrangement, and after the day for arguing the case of Southmayd out of its order had been fixed, the plaintiff and Brune's counsel applied to have the Brune cause heard at the same time, and it was consented to. The cases were argued together, not consecutively. The Southmayd case alone involved all the points raised by the secretary of the treasury. The decision of the supreme court, in both suits adverse to the government, was rendered May 29, 1850. Secretary Meredith on the 5th of July, 1850, issued a circular to collectors, &c., acquiescing in the decisions in these two suits, and adopting them as the rule of construction of the

department. This circular would not have been issued but for the decision in the case of the *United States* v. *Southmayd.* Shortly after Mr. Meredith's acquiescence in such decision he retired from office, and Mr. Corwin was appointed in his place, in July, 1850. Secretary Corwin issued a circular to collectors, &c., August 10, 1850, directing the refunding of the duties in question. This was in pursuance of the above "decisions" and of secretary Meredith's "acquiescence" therein. In the interval between the above decisions and issuing of the circulars of July 5, 1850, and August 10, 1850, repeated and continuous efforts were made by Douglass and Ogden and their counsel, to procure the issuing of said circulars, and the claims on which the decision to refund was made were the original claims of Thompson and Foulke, on which the comptroller had reported in April, 1849, and which were those represented and urged by Curtis. The refunding was arrested in December, 1850, on a question as to tare, raised by the commissioner of customs. This question was argued by the counsel for Douglass and Ogden, and also by the plaintiff. The decision made by Secretary Corwin, in favor of the importers, was the result of the argument and effort of Mr. Curtis. After the refunding recommenced, the defendants' statements of their importations of sugar and molasses, on which they claimed return of duties, were made up, and the duties recovered; the plaintiff had nothing to do with making up the statements, &c. The defendants paid Douglass and Ogden in full, over $6000. Douglass and Ogden paid over $20,000 for counsel fees and services to various parties, besides $18,000 or $20,000 received by Mr. Curtis.

The jury found a verdict for the plaintiff for $5153.25.

C. P. Kirkland, for the plaintiff.

Wm. Allen Butler and *F. B. Cutting*, for the defendants.

By the Court, ROOSEVELT, J. Shortly after the passage of the new tariff act of 1846, a question arose in relation to the duties on molasses and sugars, whether in estimating the value

a deduction should be made for drainage on the voyage of importation. The officers of the customs, including the secretary of the treasury, took ground in opposition to the merchants. Mr. Ely, the plaintiff in this case, believing as he said that the merchants were overcharged, proposed "to recover, and cause any excess of duties, so paid to the government of the United States, to be refunded," upon receiving for his services and expenses "one half of the same," or, at the option of the claimants, a reasonable compensation to be afterwards agreed upon by the parties or "fixed by referees."

Messrs. Spofford & Tileston, among others, agreeing to Mr. Ely's proposal, accordingly signed a stipulation to that affect, writing opposite to their signature, however, at the same time, the words, "not to interfere with any other arrangement already made," a very loose form of expression it must be admitted, and calculated, as it has done, to give rise to very embarrassing litigation. It was sufficient, nevertheless, to put the party on inquiry. Indeed he knew, as appears, of the pre-existing employment of Messrs. Douglass and Ogden, who were then also actually engaged in the business, and whose influence and exertions, it is obvious, contributed largely to the result, and who had to be, and actually were, liberally remunerated. Mr. Ely, notwithstanding, claimed his fifty per cent with interest and without deduction; and the jury, under the charge of the judge, gave him a verdict accordingly for $5153.25.

If this verdict stands Messrs. Spofford & Tileston, although successful in their controversy with the government, instead of realizing as was intended at least one net half of their claims, will in effect have paid the whole recovery in costs and commissions. And yet, by the terms of Mr. Ely's proposition and agreement, he was to save them harmless "from all costs and liabilities to costs," and to charge his commission only "on whatever sum or sums of money he might recover for them."

Without a more minute detail of the voluminous case presented to us, we are clearly of opinion that the judge was in error when he charged the jury that in fixing the defendants' liability,

they were "not to take into account the expenses paid to parties employed under the prior contract of February, 1848."

A new trial should therefore be ordered, costs to abide the event.

[New York General Term, September 8, 1856. *Roosevelt*, *Clerke* and *Whiting*, Justices.]

Sherman *vs.* The New York Central Rail Road Company.

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9h 705
28a 269

A written agreement for the sale and purchase of property, purporting in the body of it, to be between the vendor of the one part and the purchasers, by their agent, of the other part, signed by the vendor, and by the agent in his own name merely, a seal being annexed to each name, is not executed in the name of the purchasers, and is therefore void.

It is not binding on the agent, inasmuch as he does not profess or intend to contract for himself but for the purchasers, nor upon the latter, because it is not executed in their names. Consequently the vendor is not bound by it.

Adding a seal to the name of the agent, when he is not authorized to bind his principals by seal, will not vary the case.

The principals will, notwithstanding the seal, be bound by the contract, if it is properly executed.

But where the vendor declares upon the written agreement, and also relies upon the common counts for goods sold and delivered, he may recover upon the latter counts, if they are sustained by the proof.

In such a case the written contract should be received in evidence, not as a basis of recovery, but to show that it is void, and that therefore the plaintiff may resort to the common counts, notwithstanding the writing. There being a contract in writing, the plaintiff cannot recover on the general counts, without producing or accounting for it.

If it is produced and proved, and offered in evidence by the plaintiff, and excluded upon the defendants' objection, not that it was not proved, but that it was a contract between the plaintiff and the agent, the defendants cannot afterwards object, to a recovery on the common counts, that it was not actually in evidence.

It is not necessary to allege in the common counts that the person professing to execute the contract as agent for the purchasers, was their agent. It is sufficient to allege a sale and delivery to the purchasers; and proof that they acted by others who were their agents will sustain the allegation.

Sherman v. New York Central Rail Road Co.

The written agreement forms no obstacle to proving that the person professing to act as agent was the agent of the purchasers, and purchased the property for them.

THIS action was brought to recover the value of a quantity of firewood, alleged to have been sold and delivered by the plaintiff to the defendants. The complaint alleged that, on or about the tenth day of January, 1855, an agreement was made by and between the plaintiff of the one part, and the defendants of the other part, by which the plaintiff, in consideration of the agreement thereinafter to be performed by the defendants, agreed to sell to the defendants three hundred cords of wood, consisting principally of oak and hickory, and to deliver the same to the defendants on the Seneca canal, at Geneva; said wood to be delivered within one year from the date of said agreement, and as soon as reasonably possible from the date of said agreement; and that the defendants then and there agreed to pay the said plaintiff, for said wood, nineteen shillings (meaning $2.37\frac{1}{2}$) per cord, for each and every cord, and to make such payment for the same from the 1st to the 15th of each and every month, (thereby meaning that they were to pay from the 1st to the 15th day of each and every month, for as much of said wood as should at such time be delivered,) at the freight office of said defendants, in the village of Geneva. The plaintiff further alleged, that at the time of making said contract the said defendants were, and ever since have been and still are, a corporation, doing business under the name, firm and style of the New York Central Railroad Company. The plaintiff further alleged, that shortly after the making of the contract, and on or about the 1st day of May, 1855, he delivered to the said defendants, at the place mentioned in said contract, about two hundred cords of said wood, of the same kind and quality as mentioned in said contract, which wood was accepted by said defendants. And afterwards, to wit, on or about the first of June, 1855, he offered to deliver the balance of said wood at the place mentioned in said contract, and of the kind and quality mentioned in said contract, and the said defendants refused to receive the same, and the defendants have not paid him for the

same, or any part thereof. The complaint contained other counts for wood sold and delivered to the defendants, and demanded judgment for $500.

The defendants, by their answer, admitted that they were a corporation, doing business under the name of the New York Central Rail Road Company, but denied every other material allegation in the complaint. The cause was tried at the Yates circuit, in October, 1855, before Justice WELLES and a jury. The plaintiff proved the execution of the following agreement; and after proof had been given of the agency of Lanclot, offered the agreement in evidence.

"This agreement, by and between the New York Central Rail Road Company, by their agent, Edward Lanclot, of the first part, and Elisha W. Sherman, of Geneva, in the county of Ontario and state of New York, of the second part, made this tenth day of January, 1855, witnesseth: That the said Elisha W. Sherman, in consideration of the agreement hereinafter contained, to be performed by the New York Central Rail Road Company, or their agent above mentioned, agrees to sell the New York Central Rail Road Company three hundred cords of wood, consisting principally of oak and hickory, and to deliver the same to said New York Central Rail Road Company, on the Seneca canal, a short distance north of and below the storehouse of Hastings & Field, on the north side of said canal, between said canal and the old Auburn and Rochester rail road track; said wood to be delivered within one year from the date hereof. And the said New York Central Rail road Company, by their agent aforesaid, hereby agree to pay, in consideration of the agreement aforesaid, the said Elisha W. Sherman nineteen shillings per cord. Payment for the same to be made from the 1st to the 15th of each and every month, at the freight office of said New York Central Railroad Company, at the village of Geneva aforesaid. Signed,

EDWARD LANCLOT. [L. S.]
ELISHA W. SHERMAN. [L. S.]

Witness, GEO. M. HORTON."

The counsel for the defendant objected to the reading of the

same in evidence, on the ground that it appeared to be the sealed contract of Lanclot with the plaintiff, and not the contract of the company. The court held the same to be inadmissible, and the same was not received or read as evidence, but allowed the plaintiff to proceed in the trial, for wood sold and delivered. Evidence was then given in respect to the quantity of wood delivered by the plaintiff to the defendants, and the value thereof.

The defendants then moved the court to grant a nonsuit on the following grounds, viz: 1st. This wood is proved to be the same sold and delivered by the plaintiff to Lanclot, under the written agreement, and not to the company. 2d. Upon the mere allegation of sale and delivery, there have been no sufficient unequivocal acts of delivery and acceptance; no treaty, no price, no measurement, and no use made of the wood by the defendants; and no delivery with intent to vest the title in the defendants. The court denied the motion for a nonsuit, and to this decision the counsel for the defendants excepted.

The evidence being closed, the defendants' counsel requested the court to compel the plaintiff to elect upon which count of the complaint he relied to support his action. The counsel for the plaintiff declined to make his election, and the court declined to require such election to be made; to which decision the counsel for the defendants excepted. The jury found a verdict in favor of the plaintiff for $365.75. And the defendants, upon exceptions taken at the circuit, moved for a new trial.

Underwood, Cox & Avery, for the defendants.

E. Van Buren, for the plaintiff.

By the Court, T. R. Strong, J. The written contract for the sale and purchase of the wood, purports in the body of it to be between the plaintiff of one part, and the defendants by their agent Lanclot of the other part. It is signed by the plaintiff, and by Lanclot in his own name merely, a seal being annexed to each name, and is not executed in the name of the defendants. According to the cases of *Townsend* v. *Corning*, (23

Wend. 435,) and *Townsend* v. *Hubbard*, (4 *Hill*, 351,) this contract is void. It is not binding on Lanclot, as he did not profess or intend to contract for himself but for the defendants, from whom he had verbal authority to do so. Of course it is not binding on the defendants, not being executed in their name; and therefore the plaintiff is not bound by it. Adding a seal to the name of the agent, when he was not authorized to bind the defendants by seal, does not vary the case. The defendants would, notwithstanding the seal, be bound by the contract, as a simple contract, if it had been properly executed. (*Dubois* v. *The Delaware and Hudson R. R. Co.*, 4 *Wend.* 285. *Evans* v. *Wells*, 22 *Id.* 324, 341. *Lawrence* v. *Taylor*, 5 *Hill*, 107.)

But the plaintiff was entitled to recover upon the common counts for goods sold and delivered, if those counts were sustained by the proof. The case was submitted to the jury upon those counts only, and there was so much evidence in support of them, as to preclude interference by the court with the verdict for the plaintiff as unwarranted by the evidence.

The written contract should strictly have been received in evidence, not as a basis of recovery, but to show that it was void, and therefore that the plaintiff might resort to the common counts, notwithstanding the writing. As there was a contract in writing the plaintiff could not recover on the general counts, without producing or accounting for it. (*Ladue* v. *Seymour*, 24 *Wend.* 60. *Smith* v. *Smith*, 1 *Sand.* 206.) But it was produced and proved, and offered in evidence by the plaintiff, and excluded upon the defendants' objection, not that it was not proved, but that it was a contract between the plaintiff and Lanclot, and the defendants cannot now object to a recovery on the common counts, that it was not actually in evidence.

It was not necessary to allege in the common counts that Lanclot was agent of the defendants, and that he acted for them in the purchase; it was sufficient to allege a sale and delivery to the defendants, and proof that they acted by others who were their agents sustains the allegation.

The writing formed no obstacle to proving that Lanclot was

agent of the defendants and purchased the wood for them. All such evidence was entirely consistent with it, if that was necessary, the writing being void as a contract. Lanclot is represented therein as such agent, and as acting for the defendants.

I think no substantial error calling for a new trial has been committed, and that the judgment should be affirmed.

Judgment affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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Hall & Wheeler, overseers of the poor of Canandaigua, *vs.* J. McKechnie and A. McKechnie.

There is no particular mode by which counts or causes of action are to be separated and distinguished from each other, in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient.

Where a complaint, in a justice's court, purported to contain four several counts, or to state four distinct causes of action separately, it being averred in the first count that the defendant was indebted to the plaintiffs as overseers of the poor in the sum of $25, whereby an action had accrued to them as such overseers, according to the statute, specifying the title and two of the sections, which sections impose a penalty of $25 for selling strong or spirituous liquors or wines, in small quantities without a license, to be recovered by an action in the name of the overseers of the poor; and each of the subsequent counts stated a further indebtedness in a like sum, and was otherwise in form similar to the first; *Held*, that the complaint was sufficient, in substance.

And it being proved that the defendants were proprietors of a store, doing business together, and present in the store daily; that sales by small measure, of spirituous liquors, were made there by a clerk of the defendants, some of which occurred in their presence; *Held*, that this proof warranted the conclusion that the sales were made by their authority; and that they thereby incurred the penalty, in like manner as if they had sold personally.

Held further, that the penalty for each offense was single, and that the defendants, having united in committing the offenses, were jointly liable for the penalties incurred.

If a defendant, in a justice's court, designs to raise the objections that the complaint is not sufficiently explicit, or that it does not contain a cause of action

he should raise them by demurrer. The objection of indefiniteness and uncertainty will be waived by not thus making it. And so, *it seems*, in respect to the objection that a cause of action is not stated.

Where the parties go to trial upon a complaint, however defective, without objection on account of the defects, if the plaintiff proves a good cause of action, a judgment in his favor will be good.

THIS was an appeal by the defendants from a judgment of the Ontario county court. The action was commenced before a justice of the peace. The complaint was as follows:

"Plaintiffs in this action complain of the defendants for this; that the defendants at the commencement of this action were indebted and still are indebted in the sum of twenty-five dollars to the plaintiffs, as overseers of the poor of the town of Canandaigua, whereby an action hath accrued to the said plaintiffs as such overseers, according to the statute entitled of excise, and the regulation of taverns and groceries, chapter 20, title 9, sections 17 and 21, (4th edition,) of the first part of the revised statutes.

The plaintiffs further complaining say, that the defendants at the commencement of this action were, and still are, indebted in the further sum of twenty-five dollars to the plaintiffs, as overseers of the poor of the town of Canandaigua, whereby an action hath accrued to the said plaintiffs as such overseers, according to the statute entitled of excise, and the regulation of taverns and groceries, chapter 20, title 9, sections 17 and 21, (4th edition,) of the first part of the revised statutes.

Plaintiffs further complaining say, that the defendants at the commencement of this action were, and still are, indebted in the further sum of twenty-five dollars to the plaintiffs, as overseers of the poor of the town of Canandaigua, whereby an action hath accrued to the said plaintiffs as such overseers, according to the statute entitled of excise, and the regulation of taverns and groceries, chapter 20, title 9, sections 17 and 21, (4th edition,) of the first part of the revised statutes.

The plaintiffs further complain and say, that the defendants at the commencement of this action were, and still are, further indebted in the sum of twenty-five dollars to the plaintiffs, as over

seers of the poor of the town of Canandaigua, whereby an action hath accrued to the said plaintiffs as such overseers, according to the statute entitled of excise, and the regulation of taverns and groceries, chapter 20, title 9, sections 17 and 21, (4th edition,) of the first part of the revised statutes, wherefore the plaintiffs demand payment against the defendants for the sum of $100, besides costs."

The defendants asked to have the three last counts of the complaint stricken out, which motion was denied by the court, and they answered the complaint verbally, and denied the same.

On the trial the defendants objected to the plaintiffs proving more than one indebtedness of twenty-five dollars, or one violation. Objection overruled by the justice. The defendants admitted the plaintiffs to be the overseers of the poor of the town of Canandaigua. After the testimony was concluded, the defendants moved that the plaintiffs be nonsuited, on the ground that they had failed to make out a case; that the defendants were not shown jointly liable by the evidence; and that the action could not be prosecuted jointly. The application for nonsuit was denied, and the defendants excepted. The justice rendered a judgment in favor of the plaintiffs for $100 damages, and $3.58 costs. The defendants appealed to the county court. That court affirmed the judgment of the justice, and the defendants appealed to this court.

Smith & Lapham, for the appellants.

M. H. Peck, for the respondents.

By the Court, T. R. Strong, J. The complaint purports to contain four several counts, or to state four distinct causes of action, separately. In the first count it is averred that the defendants are indebted to the plaintiffs as overseers of the poor in twenty-five dollars, whereby an action has accrued to them as such overseers, according to the statute, specifying the title and two of the sections, which sections impose a penalty of twenty-five dollars for selling strong or spirituous liquors or wines, in

small quantities without a license, to be recovered by an action in the name of the overseers of the poor. Each of the subsequent counts states a further indebtedness in a like sum, and is otherwise in form similar to the first. No one could fail to understand from the complaint that it was intended to state separately four several violations of the section first named, and to seek to recover four penalties. There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. (*Code*, § 64, *sub.* 5.)

A motion was made before the justice, on the complaint being presented, that the last three counts be stricken out, which was properly denied; beyond this, no objection whatever was taken to the complaint. If it had been demurred to as not sufficiently explicit to enable the defendants to understand it, or that it did not contain a cause of action, it would have been the duty of the justice, if he deemed the objection well founded, to order the pleading to be amended. (*Code*, § 64, *subs.* 6, 7.) The defendants, if they designed to raise these objections, should have presented them by demurrer; the objection of indefiniteness and uncertainty is waived by not thus making it; and I think it is the same in respect to the objection that a cause of action is not stated. If the parties go to trial upon a complaint, however defective, without objection on account of the defects, if the plaintiff proves a good cause of action, a judgment in his favor will be good. But the complaint in this case is sufficient in substance. It virtually alleges violations by the defendants of the first named section, by selling strong or spirituous liquors or wines, in quantities less than five gallons, without license. (*Code*, § 64, *sub.* 5.)

It was proved that the defendants were proprietors of a store, doing business together, and in the store daily; that sales by small measure of spirituous liquors were made there by a clerk of the defendants; some of which occurred when the defendants were in the store. This proof warranted the conclusion that the sales were by their authority. Sales by their clerk, acting

under their directions, were made by them, and they thereby incurred the penalty in like manner as if they had personally sold.

The penalty for each offense is single; the defendants were united in committing the offense, and are jointly liable for the penalties incurred. (*Conley* v. *Palmer*, 2 *Comst.* 182. *Ingersoll* v. *Skinner*, 1 *Denio*, 540.)

The judgment of the county court must be affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

The City of Rochester *vs.* The Supervisors of Monroe County.

The statutes relating to the support of the poor at county poor-houses furnish no authority for a discrimination between county and town poor, in respect to the application of the income of the poor-house farm. On the contrary the legislature intended the income should be applied to the support of the poor of the county generally at the poor-house, without distinction.

The statutory provisions obviously contemplate that the benefits resulting from the poor-house and farm shall be common to the county and towns, in respect to the support of the poor at the poor-house, without any regard whatever to the general obligation of each to support its own poor.

The occupancy of the property, the products of the farm consumed thereon and in the poor-house, the labor of the poor in carrying on the farm and the business of the poor-house, the avails of sales of products of the farm and the labor of the poor, are all to go, and be applied, to reduce the expenses of the support of the poor generally, at the poor-house, without any discrimination.

Thus, where the city of Rochester was, by law, in the condition of a town, in respect to the mode of supporting its poor at the county poor-house; *it was held* that the income of the poor-house farm in Monroe county ought to be applied to the support, indiscriminately, of the county, town, and city poor, kept at the county poor-house on said farm.

THIS was a case agreed upon by the parties for submission to the court, without action, under section 372 of the code. The controversy related to the proper mode of applying the

income of the poor-house farm of Monroe county, in support of the poor therein, whose support is made a public charge. The object of the case was to obtain from the court a construction of those provisions of the revised statutes on the subject of the support of the poor, upon which the controversy depends. The facts are as follows: For several years prior to and at the date of this controversy, the county of Monroe was, and is, the owner of a poor-house farm, within said county, consisting of about one hundred and twenty acres, on which is erected the county poor-house of said county, at which are now, and have been during the period of such ownership, kept the county poor of said county, the town poor of the several towns, and of the city of Rochester in said county, or such portions of said county, town, and city poor, as are by law directed to be kept at said poor-house. This farm was purchased, and the county poor-house erected thereon, by the superintendents of the poor of said county, in pursuance of a determination of its board of supervisors, according to the statute in relation to the support of the poor, and the expense of such farm and buildings was raised by a tax on the real and personal estate of the inhabitants of said county. The distinction between town and county poor has never been abolished in Monroe county, and the city of Rochester is by law in the condition of a town of said county, in respect to the mode of supporting its poor at said county poor-house. The several classes of poor before specified, supported at said county poor-house, are, and have been since such ownership, employed indiscriminately in labor, so far as they are able, in the cultivation of said farm, under the direction of the superintendents of the poor of said county; but all the labor on said farm has not been performed by said paupers, and the part not performed by them has been a county charge; and the income of said farm has been, under the direction of the county superintendents, consumed in support of the several classes of poor, kept at said poor-house. The annual income of said farm is from three to four thousand dollars, and was three thousand eight hundred and ninety-nine dollars for the year 1854. The board of supervisors of said county at their annual session, on the 3d

day of November, 1854, adopted a resolution, directing three thousand dollars of the income of the said poor-house farm for that year to be applied to the support of the county poor of said county exclusively, and accordingly further directed that three thousand dollars be charged to the said city of Rochester and the towns of Monroe county, in proportion to the number and expense of paupers the said city and towns had severally had kept at said county poor-house during said year, and that said county be credited with that amount as income of said poor-house farm. These directions were carried into effect, and the city of Rochester was assessed with its proportion of said three thousand dollars, in accordance with said directions. Against this application of the income of said poor-house farm, the city of Rochester protested as unjust to said city as a tax-payer, and to the tax-paying inhabitants residing therein, and as unauthorized by law; and insisted, on the other hand, that by the true construction of the law, said income should be applied to the support, without discrimination, of the county, town and city poor, kept at said poor-house as aforesaid, and that only the deficiency found to exist, after exhausting that fund, (and all other funds provided by law for the support of the said poor,) should be charged to and assessed upon said towns and city. The said supervisors refused to recede from their said action, but thereupon agreed as above stated, to avoid litigation, to submit said question of difference to this court. The city of Rochester is and was, at the time of the arising of said controversy, the owner in its corporate capacity of property within its limits, liable to be taxed by said supervisors for the support of the poor, kept at said county poor-house, in the same manner as the individual property owners in said city, and as such owner, was taxed on its said property, in common with the inhabitants of said city, for a part of said three thousand dollars. The aggregate taxable property of and within the said city of Rochester amounted, in 1854, to about one third of the aggregate taxable property of said county of Monroe, including said city. The number of paupers supported at said county poor-house, in the year 1854, was 1339; the amount expended in

their support, including salaries of officers and others, during said year, was $20,072.30. The county poor, kept at said poor-house during said year, was about equal to the aggregate of said city and town poor kept there. The city poor of said city, supported at said county poor-house for the year 1854, was in the ratio of about three to one to the aggregate town poor of said county, supported at said poor-house during said year, which was about the ratio of previous years.

The question submitted to the court upon the foregoing case was this: By the true construction of the statute, ought the income of the poor-house farm, before mentioned, to be applied to the support indiscriminately of the county, town and city poor, kept at the county poor-house, on said farm; or ought it to be applied exclusively to the support of the county poor of Monroe county; or ought it to be applied exclusively to the support of the county poor of said county, after deducting the value of pauper labor performed by the town and city paupers?

F. L. Durand, for the plaintiffs.

Jerome Fuller, for the defendants.

By the Court, T. R. STRONG, J. Upon a careful examination of the statutes relating to the support of the poor at county poor houses, I find no authority for a discrimination between county and town poor, in respect to the application of the income of the poor-house farm. On the contrary, it is quite apparent the legislature intended the income should be applied to the support of the poor of the county generally at the poor-house, without distinction. By § 17, (1 *R. S.* 618,) authority is given to the board of supervisors of any county to determine to erect a county poor-house "for the reception of the poor of the county," and to direct the superintendents of the poor of such county to purchase a farm, and erect suitable buildings for a poor-house; to defray the expenses of which, the board may raise, not exceeding a specified sum, by tax on the real and personal estate of the inhabitants of the county; the tax to be raised, assessed

and collected in the same manner as other county charges. After a poor-house is established in a county, any applicant for relief to any overseer of the poor, if it appears he is in such indigent circumstances as to require permanent relief and support, and can be removed, is to be taken to the poor-house, (§ 39, *id.* 624,) and there supported and relieved, until it shall appear he is able to work and maintain himself. (§ 41, *id.*) The superintendents of the poor, who are declared a corporation, have power, and it is their duty, among other things, to purchase the furniture, implements and materials, that shall be necessary from time to time for the maintenance of the poor at the poor-house, and their employment in labor or manufactures, and to sell and dispose of the proceeds of such labor, as they shall deem expedient. They are to draw, from time to time, on the county treasurer, for all necessary expenses incurred in the discharge of their duties; which drafts are to be paid by him out of the moneys placed in his hands for the support of the poor; to account to the board of supervisors for all moneys received and expended, and all their proceedings; and to pay over all moneys remaining in their hands, within fifteen days after the expiration of their office, to the county treasurer, or to their successors. (*Id.* § 16, *subs.* 4, 9, 10, 11.) Section 47 provides, that in counties where the respective towns are required to support their own poor, the county treasurer shall credit each town with the moneys received from the same or from its officers, and charge it with the moneys paid for the support of the poor chargeable to such town; and also, if there be a county poor-house, the sums charged the town by the county superintendents, as hereinafter mentioned. By § 48, (*Id.* 626,) in a county where there is a poor-house, and the several towns are liable for the support of their poor respectively, the superintendents are required to make out annually, at a specified time, a "statement of all the expenses incurred by them the preceding year and of the moneys received, and exhibiting the deficiency, if any, in the funds provided for the defraying such expenses: and they shall apportion the said deficiency among the said several towns, in proportion to the number and expenses of the

paupers belonging to the said towns respectively, who shall have been provided for by the said superintendents, and shall charge the said towns with the said proportions." The next section directs that where there is a balance against any town, the board of supervisors shall add the same to the amount of taxes to be levied and collected upon such town. Subsequent sections provide that estimates shall be presented by the superintendents of the poor to the board of supervisors, annually, of the sums necessary for the support of the county poor, and the supervisors shall cause such sum as they deem necessary to be collected and paid to the county treasurer, to be by him kept as a separate fund, distinct from the other funds of the county; also that overseers of the poor, in counties where the respective towns are made liable for the support of their poor, shall annually present to their towns estimates of the sums necessary for the support of the poor the ensuing year; and the inhabitants of said town shall by vote determine the sum to be assessed for those purposes, which, when raised and collected in those counties where there is a county poor-house, shall be paid to the county treasurer, and by him placed to the credit of the towns. These are all the provisions of the statute material to the question under consideration; and they obviously contemplate that the benefits resulting from the poor-house and farm shall be common to the county and towns, in respect to the support of the poor at the poor-house, without any regard whatever to the general obligation of each to support its own poor. The occupancy of the property, the products of the farm consumed thereon and in the poor-house, the labor of the poor in carrying on the farm and the business of the poor-house, the avails of sales of products of the farm and the labor of the poor, are all to go, and be applied, to reduce the expenses of the support of the poor generally at the poor-house, without any discrimination. These represent the interest on the investment in the farm and buildings, and personal property connected therewith; and it would be as reasonable for the county to charge the towns the interest, or a portion of it, as to withhold from them

the benefits, or a portion of them, of the establishment in another form; indeed it would be in substance the same thing. The avails of sales should be used, as far as they will go, to pay expenses of conducting the business of the farm and poor-house and general expenses of the establishment, and thus be credited on the expenditures of the superintendents, in ascertaining the deficiency to be apportioned among the towns.

If it had been the design of the legislature that the county should have the preference as to the income of the farm, it is fair to presume the intention would have been expressed in clear terms; that what should constitute the income would have been prescribed; that directions would have been given in regard to keeping the accounts, so that the items might be ascertained, and that some provision would have been made for allowing each town a fair compensation for the labor of its poor on the farm and in the poor-house.

The plaintiffs, as it is stated in the case, are by law in the condition of a town, in respect to the mode of supporting their poor at the county poor-house. It follows that the plaintiffs are entitled to judgment that the income of the poor-house farm in Monroe county be applied to the support indiscriminately of the county, town and city poor, kept at the county poor-house on said farm.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

BEEBE *vs.* DOWD.

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A parol agreement was made between the plaintiff and defendant for an exchange of real estate, the possession to be exchanged immediately, and the respective deeds of conveyance were to be delivered as soon as the defendant's wife would consent to sign and acknowledge the deed of the defendant's property. The possession of the respective lots was accordingly exchanged, each party going into the occupation of the premises received from the other, and the defendant's wife subsequently executed and acknowledged the deed given by her husband to the plaintiff, which deed was tendered to the plaintiff, but not until after the commencement of an action of ejectment for the land agreed to be exchanged by the plaintiff. But, no time being specified by the parties within which the deed must be executed by the defendant's wife; and it not appearing that the plaintiff ever called for the deed, or gave notice to the defendant that the business must be completed; and the plaintiff having taken and retained possession of the premises which the defendant was to convey to him, and never having demanded possession of the premises in question; *it was held*, that the equitable rights of the defendant were not at all affected by the action, but remained precisely as they were before. And that if the defendant could have enforced a specific performance by the plaintiff, previous to the commencement of the action, by performing on his part, he was entitled to it afterwards; the contract having been partly performed, by exchanging possession of the lands, &c. sufficient to take it, in equity, out of the statute of frauds.

Held also, that notice to the defendant that he must perform or the contract would be abandoned, and his omission to do so in a reasonable time, or something equivalent, was necessary, to put an end to the contract. And that the delay which had occurred did not authorize the plaintiff to treat the contract as at an end, without such notice or some similar act; especially as the plaintiff had possession of the premises agreed to be conveyed by the defendant.

Held further, that the tender of the deed having been made, by the defendant, before answer, although after the suit was brought, he might plead it and have the benefit of it. But that strictly, a tender was not necessary, to entitle the defendant to a specific performance; an offer in the answer, to perform, being sufficient.

APPEAL from a judgment entered at a special term, after a trial at the circuit, before the court, without a jury. The plaintiff in his complaint alleged that he was the owner in fee simple, and entitled to the possession of a certain parcel of land in the village of Port Byron; that the defendant was in the actual possession of said premises, claiming title thereto or some interest therein, and that he unlawfully and wrongfully withheld the possession thereof from the plaintiff, and the plaintiff

demanded judgment for the surrender of the possession of said premises with $250 damages, for unlawful detention and rents and profits thereof. The defendant's answer, 1. Denied that the plaintiff was at the time alleged seised in fee of the said real estate, or that he had any right or interest therein; 2. Admitted the possession of the defendant; 3. Denied unlawful or wrongful withholding; 4. Denied each and every allegation in the complaint not therein before admitted in said answer; 5. It alleged that on or about the 20th day of January, 1855, the plaintiff and defendant made a verbal agreement, whereby the said plaintiff and defendant agreed to trade and exchange houses and lots, and whereby the defendant agreed to give to the plaintiff the Eagle tavern stand in Port Byron at the price of $6800, to be paid for as follows, to wit: the plaintiff agreed to give to the defendant therefor the house and lot in question at the price of $1500, one span of horses at the price of $260, the plaintiff's note or notes in the sum of $1000, and said plaintiff to assume and pay certain liens or incumbrances on the tavern stand, amounting to the balance of the said purchase price; that the possession of the said lots was to be exchanged in pursuance of said agreement immediately, and the deeds of conveyance therefor to be delivered as soon thereafter as the defendant's wife would sign and acknowledge the defendant's deed to the plaintiff; that the possession of said lots and premises was exchanged, and the plaintiff gave the defendant the possession of the premises in question in pursuance of said agreement; and that the whole of the property and the consideration therefor passed from the defendant to the plaintiff, and was received by the plaintiff in full payment and satisfaction therefor; that in pursuance of the said agreement, the defendant's wife did thereafter sign and acknowledge the said deed from the defendant to the plaintiff, and the same had been tendered to the plaintiff, which he had refused to accept; that the possession by the defendant of the premises in question was in pursuance of, and in accordance with, said agreement; that the defendant had fully performed all the conditions of said agreement on his part, and that on or about the 30th day of January, 1855, and after the plain

tiff had taken possession of the Eagle Hotel, and while he was in the possession thereof, the said tavern and buildings attached thereto were wholly destroyed by fire, so that the said property thereby became almost entirely valueless; and that it was therefore out of the power of the plaintiff to restore to the defendant the property which he had so received from the defendant; that in consequence of the said destruction of the said property and the depreciation of the value thereof, while in the care, control and possession of the said plaintiff, and owned and held by him as his own lawful property, it would be unjust for the plaintiff to recover the relief demanded in the complaint in this action.

And the defendant submitted that the plaintiff was bound, in equity and law, to deliver the said deed of the premises described in the complaint to the defendant, and fully execute and perform his said contract; and the defendant prayed that this court, in pursuance of the legal and equitable powers therein vested, would adjudge and decree the full and specific performance of the said contract by the plaintiff in pursuance of his said agreement, as the same was above set forth, and for such further and such other relief in the premises as the defendant might be entitled to, either at law or in equity, &c. The facts proved on the trial sufficiently appear in the opinion. The court decided that the plaintiff was the owner in fee of the premises in question, and that he was entitled to recover the possession thereof from the defendant. The defendant appealed from that judgment.

H. V. Howland, for the appellant.

Chas. C. Dwight, for the respondent.

By the Court, T. R. Strong, J. The learned justice before whom this cause was tried, as appears from the opinion delivered by him, inclined to think that if the defendant had tendered to the plaintiff such a deed as he was to give, before the commencement of the action, the defense set up would be valid and sufficient, and the defendant would be entitled to a judgment for a

conveyance to him by the plaintiff of the premises in question. This implies, that in the view of the justice the defendant had substantially performed on his part in all other respects the contract between the parties, and that the contract, when the action was brought, was still subsisting. But inasmuch as the deed was not tendered until after the action was commenced, he decided that the tender was too late, and was unavailing; that the defendant being in default before the action, for not tendering the deed, the plaintiff had a right to repudiate the contract, which he had done, by bringing the action; and thereby the defendant had lost all his equitable rights in the case. I cannot concur in this decision as to the effect of the action upon the equities of the defendant. It would be highly unreasonable to hold the defendant concluded by the suit from all title to equitable relief. No time was specified, when the papers were left with Haynes, (to be delivered on the execution of the deed to the plaintiff by the wife of the defendant,) within which the deed must be executed by her; it does not appear that the plaintiff subsequently called for the deed, or gave notice to the defendant that the business must be completed; the plaintiff took and retained possession of the premises the defendant was to convey to him; and he never demanded of the defendant possession of the premises in question. Under these circumstances I think the equitable rights of the defendant were not at all affected by the action, but remained thereafter precisely as they were before. If the defendant could enforce a specific performance by the plaintiff before the suit, as I think it clear he might by performing on his part, the contract having been partly performed by exchanging possession of the lands and otherwise, sufficient to take it in equity out of the statute of frauds, he was entitled to it afterwards. Notice to the defendant that he must perform or the contract would be abandoned, and his omission to do so in a reasonable time, or something equivalent, was necessary to put an end to the contract. The delay which had occurred did not authorize the plaintiff to treat the contract as at an end, without such notice or similar act, especially as the

plaintiff had possession of the premises to be conveyed by the defendant.

There was some evidence tending to show that the defendant had failed to perform the contract on his part otherwise than by not giving the deed, but the decision of the cause was not placed on the ground of any such default; and the defendant is entitled to have that subject distinctly passed upon by a jury, or the court in place of a jury, at the circuit or special term.

The tender having been made before the answer, although after the suit was brought, the defendant might plead it and have the benefit of it. Such was the rule in equity in like cases under the old system, and I do not perceive any good reason why it should not prevail under the code. (*Willis* v. *Chipp*, 9 *How. Prac. R.* 568. *Houghton* v. *Skinner*, 5 *id.* 420. *Beals* v. *Cameron*, 3 *id.* 414. *Lyon* v. *Brooks*, 2 *Edw. Chan. R.* 110. *Brush* v. *Vandenbergh*, 1 *id.* 21. *Code*, § 177. 1 *Barb. Chan. Prac.* 140, 141.)

Strictly, a tender was not necessary to entitle the defendant to a specific performance. An offer in the answer to perform would be sufficient in the place of it, if even that was necessary. The defendant might have sustained an action for that relief without a tender; but the omission of a tender might affect the question of costs. (*Stevenson* v. *Maxwell*, 2 *Comst.* 408.)

My opinion therefore is, that the judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment accordingly

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

SPENCER *vs.* TOBEY.

22 260
14h 163
64a 294

Where the plaintiff had been in possession of premises for several years, claiming title thereto, and the defendant went into possession under a contract with the plaintiff, by which the defendant agreed to purchase the plaintiff's improvements, and his title to the premises as soon as it should be settled, if it should prove to be good; the title, as stated in the contract, being then in dispute; *Held*, that this was abundant evidence of title in the plaintiff to sustain an action of ejectment, aside from the rights of the defendant under the contract. That the prior possession of the plaintiff was prima facie evidence of his title, and the defendant, by taking possession under him, was precluded from disputing his title, except to show that he, the defendant, was not in default in performing the contract. And this, notwithstanding the recital that the title was in dispute; a better title than the plaintiff's not being recognized.

In an ordinary contract for the sale and purchase of land, which is silent in respect to the possession, a license to the purchaser to enter will not be implied.

Where A. agreed to sell his improvements on a lot to B., for which B. agreed to pay a specified sum at the date of the contract, but it was not stated, and did not appear, in what the improvements consisted, and no explanation was given as to the meaning which the parties attached to the term; and A. further agreed after stating that the title of the land was in dispute, to sell to A. as soon as the title should be settled, if it proved good, the right of soil; B. agreeing that if A. should procure such title, he would pay a specified sum, on receiving a deed; *Held*, that the contract was, in effect, that B. would pay A. a certain sum for his work and labor on the land, and a further sum for a good title when the dispute in regard to the title should be settled, with no express provision as to the possession. And that there was no implication that B. was to have possession of the premises, previous to a conveyance. That by omitting to insert any stipulation as to the possession, the right to the possession was left in A.

Held also, that the fact of A. having given B. the possession, when he was not entitled to it under the contract, did not affect A.'s right to recover the possession; nor could that act, subsequent to the contract, aid in the construction of the contract.

Held further, that, assuming that B. was by the contract to have possession, no time being specified for its continuance, if he had made default in performing the contract, his right to possession was thereby terminated.

That in the absence of any proof that the dispute as to the title continued, the undisturbed possession of the premises by B. for six years was *prima facie* proof that the title was settled, and good in A., and, in connection with evidence of the tender of a deed by A. and a refusal to pay, proved a default by B.; it not being incumbent on A. to prove a regular chain of title to the premises from the original source, or that the title had been adjudged valid by a competent tribunal.

Spencer *v.* Tobey.

APPEAL from a judgment entered at a special term, after a trial at the circuit, before the court, without a jury. The action was brought to recover the possession of real estate. The answer of the defendant denied that the plaintiff had lawful title, as the owner in fee simple, to the premises in question. The defendant admitted that he was in possession, but denied that he unlawfully withheld possession from the plaintiff. The defendant further answering alleged, that on or about the 11th day of April, 1846, he, the defendant, entered into possession of said premises with the consent and by the authority and license of the plaintiff, and has continued in possession thereof from that time to the present, by and with the license and consent of the plaintiff; and that the plaintiff had never revoked such consent and license, and had not demanded possession of said premises or any part thereof. That on the 11th day of April, 1846, the plaintiff and defendant entered into an agreement, of which the following is a copy: "A contract made the 11th day of April, one thousand eight hundred and forty-six, between Smith Spencer of the first part, of the town of Canton, county of Steuben, state of New York, and Amiziah Tobey, of the town of Thompson, Susquehanna county, Penn., as follows, to wit: Smith Spencer of the first part agrees to sell to Amiziah Tobey of the second part, his improvement on lot No. 1, in the Canton and Carrol tract, in the town of Canton, it being 20 acres on the southwest corner of said lot, together with his sap buckets and one store tub, and one hog. And Amiziah Tobey of the second part, agrees to pay Smith Spencer of the first part, seventy dollars for the above improvement and property, to be paid on the date of this contract. The title of said land now being in dispute, the party of the first part further agrees, that as soon as the title is settled, if his title proves good, to sell to Amiziah Tobey of the second part, the right of soil, and to give a good and sufficient deed with covenant of warranty. If he procures such title, the said Amiziah Tobey of the second part, agrees to pay Smith Spencer of the first part, the sum of one hundred and forty dollars, on the

receipt of such deed. We bind ourselves, heirs and assigns and administrators to fulfill the above contract.

SMITH SPENCER,
AMIZIAH TOBEY."

The defendant averred that he paid to Spencer the said sum of seventy dollars, at the date of said contract. That at the time of making such contract, the plaintiff was in possession of said premises, that he thereupon immediately surrendered possession thereof to the defendant, who entered upon the possession thereof with the license and consent of the plaintiff, and has ever since continued in possession of the same with the plaintiff's consent, and that the plaintiff has not demanded possession thereof from the defendant. The defendant further alleged, that he had always been ready and willing to perform such contract on his part, but that the plaintiff had neglected and refused to perform the same. "That the title to said land and premises still remains and now is in dispute and is unsettled, and that the plaintiff's title to said premises has not proved good, and the plaintiff has not at any time since the date of said contract procured a good title in fee simple to said premises, and he has not been able to sell and convey the same to the plaintiff by a good warranty deed."

The issue so joined came on to be tried at a circuit court held in Steuben county in May, 1855, before the Hon. THOMAS A. JOHNSON, one of the justices of this court, without a jury, a jury trial having been waived by consent of parties. The plaintiff read in evidence a warranty deed of the premises in question, from Samuel Pennington, to him, dated July 12, 1841, and acknowledged the same day. This deed was executed by Samuel Boyer, as attorney for the grantor. The plaintiff called as a witness Henry N. Howe, who testified: "I reside in Canton. I have resided there thirty years. I have known Smith Spencer twelve or fifteen years. I heard the description of the premises read from the deed produced in evidence. I know the premises. I know of plaintiff being in possession of premises from five to six years ago. He was in possession three or four years. There was a house and clearing on the

premises, enclosed. He claimed the whole twenty acres at that time, as he said." And being cross-examined, the witness further testified: "The said Amiziah Tobey took possession of the premises afterwards." The plaintiff then rested. The defendant thereupon moved to nonsuit the plaintiff, upon the following grounds: *First.* That the deed introduced by the plaintiff did not confer upon him any title to the premises in question, as it was executed by an agent, and no proof of agency or authority to execute the same was shown. *Second.* Upon the ground that the plaintiff had not shown a chain of title from the state to himself of the premises in question, nor had he shown title thereto in any other manner. *Third.* That an equitable defense was set up by the answer, upon which the plaintiff had not taken issue, and which thus standing admitted, was a bar to the plaintiff's right to recover in this action; which motion was overruled, and the defendant excepted. The defendant then called as a witness Stephen Tobey, and proved by him and read in evidence the contract between the parties, dated April 11th, 1846, which is above set forth. The defendant also proved that he took possession of the premises under such contract, and had ever since continued in possession of said premises and had paid the seventy dollars specified in said contract. The defendant here rested. It was then admitted that just prior to the commencement of this action, the plaintiff and his wife executed a deed of the premises in question to the defendant, containing covenants of seisin, against incumbrances. and warranty, (which deed was duly acknowledged by the grantors, and was produced and read in evidence,) and tendered the same to the defendant which the defendant declined to accept, and declined to pay the sum of one hundred and forty dollars specified in said contract. The evidence here closed, and the defendant requested the court to hold and decide, that it was a condition precedent to the plaintiff's right to recover the possession of said premises that he should establish and prove a chain of title from the state of New York to himself of the premises in question, and that he was the owner of the fee thereof; or that he should establish that the dispute concerning

such title had ceased, and that his title had been established by a judgment or decree of a judicial tribunal of this state, having jurisdiction; or that he had procured the fee of said premises subsequent to the 11th day of April, 1846: each of which requests were separately denied by the court, and to each of which denials the defendant separately excepted. The court held and decided that it was not necessary, to entitle the plaintiff to recover, that he should prove any title to said premises That the defendant having derived possession thereof from the plaintiff, was not at liberty to dispute his title, and that the defendant having refused to accept the deed tendered by the plaintiff to him, the plaintiff was entitled to judgment for the recovery of the possession of said premises. To which ruling and decision the plaintiff excepted.

The following opinion was delivered by the judge, at the circuit:

"JOHNSON, J. There is nothing in the evidence to take the case out of the general rule, that one who enters into the possession of premises under a contract to purchase, cannot dispute the title of his vendor until after he has surrendered the possession thus obtained. At the time of this contract the plaintiff was in possession, having a paper title and claiming to be the owner, although it was admitted in the contract that his title was in dispute. The defendant purchased and paid for the improvement upon the land, and it was agreed between the parties, the title being in dispute, that as soon as it was settled, if the plaintiff's title proved good, the plaintiff would sell to the defendant, and the latter purchase, the right of soil, or in other words, the title to the land, for $140, to be paid on the execution and delivery of the plaintiff's warrantee deed. This, it will be perceived, is not an absolute agreement to sell on the one hand, and to purchase on the other, presently, but only when the title should become settled, and in the event of the plaintiff's title proving good. No right of possession is given to the defendant by the terms of the contract, and what is there to show that he has any right to the possession at all, much less for an indefinite period? Nothing whatever. But conceding

that the defendant's entry at the date of the contract, and his subsequent possession, was lawful, how long could he continue to hold as against the plaintiff? Certainly not forever, by virtue of this agreement. The plaintiff was under no obligation to institute proceedings against any one to settle the title. He had never been disturbed in his possession, nor had the defendant. The latter had held peaceably, for aught that appears under his contract, for a perjod of nearly five years. The plaintiff then offers to complete the sale, and tenders a warrantee deed and demands payment; but the defendant refuses to accept the deed and pay the stipulated price. Perhaps he was under no obligation to do so, as he had only undertaken to purchase and pay when the title should become settled and proved to be in the plaintiff. But it is clear, I think, that he could not object to take title from the plaintiff, and still retain his right to the possession, as that would give him the advantages of a title without purchase or payment. He had no right to dispute the plaintiff's title, and the moment he undertook to do so, his right to hold possession under the plaintiff was at an end. It is not pretended that the defendant had the title which was supposed to be hostile to the plaintiff's, nor that he represented any one who had it. All his right he derived from the plaintiff, and he must surrender it back before he can be heard to allege that the title of the plaintiff is invalid.

No notice to quit was necessary; the action is well brought, and the plaintiff is entitled to the judgment demanded in his complaint."

From the judgment entered upon this decision the defendant appealed.

D. W. Gillett, for the appellant. I. The deed being executed by an agent, and no authority shown, did not establish any title in the plaintiff. Nor did the plaintiff show any title, or attempt to show any, (except such deed and possession, less than 20 years, by him) under it.

II. An equitable and complete defense was set up in the answer, constituting a counter-claim, which, not being replied to, was admitted and established, and was a bar to the plaintiff's right to recover.

III. The contract between the parties established that the title to the premises was not in the plaintiff at the date thereof, and did not vest in him by the deed from Pennington; also, that the plaintiff was in possession, April 11, 1846; and that the plaintiff had made clearings and erected buildings thereon, or in the language of the contract, "improvements." Under these circumstances the plaintiff sold to the defendant "his improvements," meaning, as the parties understood and intended to contract, *the possession of the premises*, and the right to occupy without molestation by the plaintiff, until the disputed title *should become a good and settled title.* This is the only construction to be put on the contract; because, if not so, the defendant paid $70 for a shadow, neither getting title nor the right of occupancy: because the parties by their action have so construed their agreement, the plaintiff surrendering possession to the defendant immediately upon the execution of the contract. It then became incumbent upon the plaintiff, before he could divest the defendant of the right to occupy, and make such occupancy unlawful, to show, 1. That his *title* had been adjudged by a competent tribunal to be valid, (he admitting by the contract it was invalid and in dispute;) or, 2. A chain of title from a grantor shown to have been the owner.

Geo. T. Spencer, for the plaintiff. I. The plaintiff proved his prior possession of the premises in question, under a deed with a claim of title to the whole twenty acres described in the deed, of which a part were improved and enclosed. The possession was sufficient evidence of title for the purpose of this action, and authorized a recovery on proof of the defendant's possession, which is admitted in the answer. (*Day* v. *Alverson*, 9 *Wend.* 223. *Jackson* v. *Hazen*, 2 *John.* 22. *Jackson* v. *Harder*, 4 *id.* 202. *Smith* v. *Lorillard*, 10 *id.* 338. *Jackson* v. *Rightmyre*, 16 *id.* 314. *Jackson* v. *Walker*, 7 *Cowen*, 637.)

II. The deed from Pennington to the plaintiff was proper and competent evidence for the purpose of showing the character and extent of the plaintiff's possession, even without proof of the authority of the attorney by whom it was executed. But if it was not, there was no objection made to its introduction in evidence, and none can be made on appeal. Besides, the objection is obviated by the contract given in evidence by the defendant. (2 *R. S.* 294. *Jackson* v. *Todd*, 2 *Cai.* 183. *Jackson* v. *Ellis*, 13 *John.* 118. *Jackson* v. *Wheat*, 18 *id.* 40. *Jackson* v. *Newton*, *Id.* 355.)

III. The contract set up in the answer, and given in evidence on the trial, constitutes no defense to the action; but, on the contrary, is an admission of the plaintiff's title, and sustains his right to recover. The recital in the contract of the fact that the title is in dispute, and the agreement for payment of the purchase money and a conveyance, if it shall prove good, does not make this case an exception to the rule that a party who has taken possession under a contract of purchase, must surrender possession before he can dispute the title under which he took such possession, no matter how defective the title may be. (*See Jackson* v. *Reynolds*, 1 *Caines*, 444; *Jackson* v. *Spear*, 7 *Wend.* 401.)

In the case of *Glen* v. *Gibson*, (9 *Barb.* 634,) the rule is stated to be, that "when one is put in possession of land by another, the former is not at liberty to controvert the title of the latter until he has restored the possession so received, and placed the other party in as good position as he was before he parted with the possession." The contract given in evidence gives the defendant no possession or right of possession in the premises. The defendant neither claims or proves any title in himself or any third person. The defendant has had undisturbed possession for more than six years, and, so far as appears, the title has not been questioned in all this time. The recovery of possession of the premises does not depend upon the title proving good, whatever may be the case as to the recovery of the purchase money. The defendant cannot keep the land and at the same time withhold the price. If he could

the defendant has made a cheap purchase, and one never contemplated by the plaintiff. The plaintiff having done all that lay in his power to give the defendant a perfect title, which was refused, he is entitled to the possession of the premises.

IV. The defendant was not entitled to notice to quit. The tender of the deed and demand of payment was sufficient notice. (*Jackson* v. *Moncrief*, 5 *Wend.* 26. *Wright* v. *Moore*, 21 *id.* 230. *Powers* v. *Ingraham*, 3 *Barb.* 576.)

By the Court, T. R. Strong, J. The plaintiff was in possession of the premises several years, claiming title; and the defendant went into possession under a contract between the parties, whereby he agreed to purchase the improvements of the plaintiff, and his title to the premises, as soon as it should be settled, if it should prove to be good, the title as stated in the contract being then in dispute. This was abundant evidence of title in the plaintiff to sustain the action, aside from the rights of the defendant under the contract. The prior possession of the plaintiff was *prima facie* evidence of his title; and the defendant, by taking possession under him, was precluded from disputing his title, except to show that the defendant was not in default in performing the contract. This is so, notwithstanding the recital that the title was in dispute, as a better title than the plaintiff's is not recognized.

We are then to inquire, whether under the contract the defendant is entitled to the possession of the premises. The contract does not in terms give the defendant a right to the possession. If it gives him such a right, the right must be implied. In an ordinary contract for the sale and purchase of land, which is silent in respect to the possession, a license to enter will not be implied. The contract in the present case is peculiar. The plaintiff agrees first to sell his improvements on the lot to the defendant, for which the latter agrees to pay a specified sum at the date of the contract. It is not stated, and does not appear, in what the improvements consist, and no explanation is given as to the meaning which the parties attached to the term. And there is no evidence whatever

beyond the contract, on the subject of improvements made by the plaintiff. As the court cannot see by the contract, or the evidence, that something else was intended, I think improvements must be construed to mean work and labor generally of the plaintiff enhancing the value of the premises. This view is supported by the construction given to parol contracts for the sale of improvements on land, which are held not to be within the statute of frauds, as they are virtually contracts to pay for work and labor. (*Lower* v. *Winters*, 7 *Cowen*, 263, *and cases cited.*) It is next agreed by the plaintiff, after stating that the title of the land is in dispute, to sell to the defendant, as soon as the title is settled, if it proves good, the right of soil; and the defendant agrees, if the plaintiff procures such title, to pay a sum named, on receiving a deed. The contract is then, in effect, that the defendant will pay the plaintiff a certain sum for his work and labor on the land, and a further sum for a good title when the dispute in regard to the title is settled, with no express provision as to the possession. I think here is no ground for an implication that the defendant was, before a conveyance, to have possession of the premises. Whether it was wise in the defendant to pay down for the improvements, without securing a right to the possession of the land, or any right to a deed, except on the contingency specified; or for the plaintiff to sell the improvements at the price agreed on, and give up the possession, without any obligation on the defendant to pay him for the title, except upon that contingency, was for the parties to determine; and which the court have not the means intelligently to decide. By omitting to insert any stipulation as to the possession, the right to the possession was left with the plaintiff.

The plaintiff having given the defendant the possession, if he was not entitled to it under the contract, does not affect the plaintiff's right to recover. Nor can that act, subsequent to the contract, aid in the construction of the contract.

But assuming that the defendant was by the contract to have possession, no time being specified for its continuance, if the defendant has made default in performing the contract, his

right to possession is thereby terminated. The evidence shows that just prior to the commencement of the action the plaintiff made and tendered to the defendant a proper deed of the premises, and demanded payment of the sum to be paid for the title, and the defendant refused to accept the deed and pay the money. It is insisted this evidence does not establish a default of the defendant; and that it was incumbent on the plaintiff, for that purpose, to prove in addition a regular chain of title to the premises from the original source, or that the title has been adjudged valid by a competent tribunal. In this I cannot concur. What the dispute referred to in the contract was—whether or not a suit was pending involving the title—by whom the title was disputed—does not appear; it does appear that the defendant had, at the time of the tender and refusal, been in possession of the premises about six years; there was no proof that he was molested in the possession, or indeed that after the date of the contract any one asserted a right to the land hostile to the title of the plaintiff. In the absence of any proof that the dispute continued, I think the possession of the defendant for such a length of time was *prima facie* proof that the title was settled, and good in the plaintiff; and in connection with the evidence of a tender of the deed and refusal to pay, proved a default by the defendant.

My conclusion therefore is, that the judgment at special term is right, and should be affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Just'ces.]

GORMLY *vs.* MCINTOSH.

BAKER *vs.* BRADFIELD.

22 271
36 248
26h 182
27h 373

Where an appeal is taken, to the supreme court, from a judgment of a county court, on the ground that the latter court had no jurisdiction of the subject matter for which the nction was brought, the supreme court has jurisdiction to reverse the judgment and to award to the appellant his costs in that court.

But where the want of jurisdiction is apparent on the face of the summons and complaint, the county court should dismiss the suit without costs. And in such cases the appellant cannot recover costs in the supreme court, for the proceedings in the county court.

Where the want of jurisdiction does not appear upon the face of the proceedings, but is presented by plea or demurrer, the court has jurisdiction to pass upon and determine the question presented; and in such a case the party prevailing is enittled to costs.

IN these suits and in several others, actions were commenced in the Monroe county court, and judgments recovered and docketed therein, from which appeals were brought to this court. This court, at the March general term, reversed the judgments on the ground that the county court had no jurisdiction of the subject matter for which the actions were respectively brought, under the decision of the court of appeals in *Kundolf* v. *Thalheimer*, (2 *Kernan*, 593.) The appellants in the several causes, claiming costs, presented bills for allowance to the county clerk, some embracing costs upon appeal in this court only, and some full costs in both courts. From the decision of the clerk in allowing such costs the respondents appealed by way of motion for a readjustment of, or disallowance of, costs, and the several motions were sent to the general term, and were brought in and argued together by.

J. L. Angle, for the respondents.

H. R. Selden and *Wm. F. Cogswell*, for the appellants.

By the Court, E. DARWIN SMITH, J. Judgments having been rendered and perfected in the county court in these cases, the parties affected thereby had a right to bring appeals

to this court from the same. The judgments were liens upon the property of the defendants, and would have protected ministerial officers in enforcing the same by execution. The code (*sec.* 344) gives an unqualified right of appeal in such cases. The actions were therefore all properly brought into this court. It is now claimed by the respondents, that as the county court had no jurisdiction, this court acquires none upon the appeal. The argument of the respondents' counsel is, that an appeal is but a continuation of the suit below, and that this court, where the court below had no jurisdiction of the subject matter, can render no binding judgment except to dismiss the appeal and the suit. Appeals from justices of the peace, under article 11, chapter 2, part 3 of the revised statutes, to the court of common pleas, were held to be a mere continuation of the suit before the justice. (7 *Wend.* 434. 4 *Denio*, 84.) In the last case Judge Beardsley says, "The entire proceedings are all in one suit, although it was pending at different periods in distinct courts." The remedy by appeal, in this class of appeals, was in effect a new trial of the cause in the court of common pleas. In this class of cases Judge Cowen says, in *Malone* v. *Clark*, (2 *Hill*, 658,) "If the court below had no jurisdiction of the subject matter, the course was not to render any judgment at all. The court should simply have refused to proceed with the cause, and dismissed it from their consideration. If the justice had no jurisdiction in this respect, the common pleas had none." The rule as stated by Judge Cowen, that where the court in which any proceeding is instituted has no jurisdiction of the subject matter, its course is to dismiss the suit or proceeding without rendering any judgment, is doubtless the true one. This is where the want of jurisdiction appears upon the face of the proceedings, and must necessarily be limited to such cases. And in all such cases, when the cause goes to a superior court upon *appeal*, the want of jurisdiction is equally fatal there, and the superior court should render such judgment as should have been rendered in the court below. The rule is in effect so held in the following cases.

In *Barlow* v. *Brew*, (1 *Verm. Rep.* 488,) Hutchinson, J

says, "If there be no original jurisdiction, there can be no appellate, properly speaking." So in *Williams* v. *Blunt*, (2 *Mass. Rep.* 207,) it was held that the appellate jurisdiction failed because the court below had no jurisdiction, and the case was simply dismissed. (*See also* 23 *Pick.* 110.) This was a case of appeal. It was held that the court below had no jurisdiction, and the want of jurisdiction appearing on the face of the writ, the case was dismissed without costs. In *Nicol* v. *Patterson*, (4 *Ham. Ohio Rep.* 200,) which case was brought from a justice of the peace, the court say, "We are of opinion that an appellate court, as such, has no jurisdiction of the subject matter, where the court in which the cause originated had none, and therefore, when the parties themselves show the fact, it is the duty of the appellate court, at any stage of the proceedings, to dismiss the cause and leave the costs to be recovered by those interested in them." (*See also Wrights' Ohio Rep.* 417; 2 *J. J. Marshall*, 29; *Stephen* v. *Bard*, 4 *Dallas*, 330.) But where the proceeding is by writ of error or certiorari, the rule is different. The writ of error or certiorari is held to be a new suit in the superior court, and that court can reverse the judgment or proceeding of the inferior court with costs. In 4 *Denio*, 85, Beardsley, J. says, "A certiorari sued out to reverse a judgment of a justice of the peace, like a writ of error, is the commencement of a new suit, and not the continuation of an old one." In *Striker* v. *Mott*, (6 *Wend.* 465,) a writ of error was brought in a case where the justice had no jurisdiction. The judgment was held void, and reversed. In 7 *Metc.* 590, it was held that a writ of error will lie to reverse a void judgment. (2 *Cranch*, 126. 2 *Sand.* 47, *note* 8.) The writ of error was held to be a new suit also in the case in 1 *Verm. Rep.* 491; the court says, that "A writ of error gives to the court a new jurisdiction, fully competent for the taxation of costs, as well as for affirming and reversing the judgment complained of." The want of jurisdiction in these cases, of the subject matter, being apparent on the face of the summons and complaint, the county court should have dismissed the suits without costs, in conformity with the rule as laid down by Judge Cowen in 2 *Hill*, 658; and it follows

that no costs can be recovered by the appellants for the proceedings in the county court, and the allowance on taxation by the county clerk of such costs must be reversed. This rule in respect to costs cannot apply in cases where the want of jurisdiction does not appear upon the face of the proceedings; but it is presented by plea or demurrer, and the court is called upon to adjudicate upon that question. Whenever the question of jurisdiction is presented by plea or demurrer, and the plaintiffs' complaint presents a *prima facie* case of jurisdiction, the court has jurisdiction to pass upon the question presented, to decide and determine it, and in such case the party prevailing must be entitled to costs. The rule in such cases is correctly stated in 5 *Metc.* 240, and 7 *id.* 561. In *Thomas* v. *White*, (12 *Mass. Rep.* 370,) costs were allowed, though the court had no jurisdiction, on the ground that the want of jurisdiction was not manifest on the face of the writ, but was ascertained by the defendant's plea. In the case in 5 *Metcalf*, Wild, J. says, "In all cases where the want of jurisdiction does not manifestly appear on the face of the writ, and the question of jurisdiction is a fair subject of discussion and for the decision of the court, there seems to be no reason why the defendant, if he prevail on the decision of the question in his favor, should not be entitled to costs." The same view is reasserted with great force by Chief Justice Shaw, in the case in 7 *Metc.* 590. In this state the code gives the right to demur for want of jurisdiction. (*Sec.* 144, *sub.* 1.) On the decision of such a demurrer it cannot be that the prevailing party would not be entitled to costs under sections 303, 304 and 305 of the code. The court in all such cases is called upon to decide, and must in the due course of judicial proceedings determine whether or not it has jurisdiction to hear the parties on the merits. But in the cases now before the court, the question of jurisdiction was not raised in the county court. It was first raised upon the appeal in this court, and was not here litigated. Upon the authority of the decision in 2 *Kern.* 593, this court disposed of these cases without argument, by a simple reversal of the judgment of the county court, on the express ground that that court had not jurisdiction.

Whether this court rendered the right judgment, and whether the appellant is or is not entitled to costs in this court, depends upon the question, in what light we are to regard these cases as in this court. They were brought here upon appeal. If the appeal has the force of a writ of error at common law it conferred a new jurisdiction, and the appellants are entitled to the costs of this court; but if the appeal merely continues the same suit, as was the case on appeals from justices' courts to the court of common pleas, before the code, then no costs should be allowed in this court. There is no action here, strictly speaking; the judgment of the county court is void and a nullity, and this court should have dismissed the suit. Before the code there were two modes of reviewing the proceedings of inferior courts, in force in this state. One, the common law mode by writ of error, and the other by appeal, as practiced in courts of equity. Judgments in common law actions were reviewed by writ of error. Decrees in chancery were reviewed by appeal from the vice chancellor to the chancellor, and from the chancellor to the court for the correction of errors. The new constitution recognizes the distinction between law and equity as it then existed. (*Art.* 6, §§ 3, 5, 10, 14.) And the judiciary act of 1847 retained the mode of review of judgments by writ of error and of decrees in equity by appeal, as it then existed. (*Sec.* 17, *Session Laws*, 324.) The code (§ 323) declares that "writs of error in civil actions as they have heretofore existed are abolished, and the only mode of reviewing a judgment or order in a civil action shall be that prescribed by this title." Subsequent sections provide for appeals from the supreme court to the court of appeals, and in the supreme court from judgments and decrees rendered by one judge and from judgments of the county courts. One uniform system is provided for all these cases by appeal. Such the commissioners say was their design. But is the force of the appeal the same in all cases, and if so, what is its precise force? It seems to me that the changes in the mode of review were not intended to change its character or the principles which had previously been adopted and sanctioned, through a long period of time, in the history of the common law. It was

not intended to abolish any principle or rule of the common law but only to change the mode of applying and carrying out the principle. In short the appeal, in respect to judgments or proceedings in common law actions, was intended to be and is a mere substitute for a writ of error, and, in respect to equitable proceedings, it was to be just such a proceeding, and with just such force, as was then in practice in reviewing proceedings in equity by appeal to the chancellor from the vice chancellors' courts, and from the chancellor to the court for the correction of errors. The review in both classes of cases was, and it now is, from a final determination of the inferior court. The court of appeals now has the power to review upon appeal every actual determination made by this court at a general term, and this court has like power to review every judgment in the county court. (*Code*, §§ 11, 344.) In both cases the jurisdiction is appellate, but the statute authorizes the review, and I think creates a new jurisdiction depending upon no other fact than the existence of a final judgment in this court and the county court, in the respective cases. This carries out the analogy in respect to writs of error and appeals, as they existed and were applied in practice in the old court for the correction of errors. The proceedings in law and equity, as such terms have been heretofore known and applied, are distinct in their nature and must go along together, *pari passu*, in this court, each regulated more or less by its peculiar characteristics; one being a creature of the *common* and the other of the *civil* law.

Treating these appeals, therefore, as having respect to the character of the proceedings to be reviewed, which were judgments at common law, they should be considered as substitutes for writs of error, and creating and conferring upon this court a new and distinct jurisdiction. In this view the judgment rendered by this court, of reversal, was the proper and appropriate judgment. The court of appeals has practically taken this view of their power on such questions. In *Frees* v. *Ford*, (2 *Selden*, 176,) they reversed the judgment of this court with costs, on the ground that the county court had no jurisdiction of the cause; and in the case of *Kundolf* v. *Thalheimer*, (2 *Kernan*,

593,) that court rendered the same judgment. If the doctrine be true that an appeal universally is a mere continuation of the original suit, and that if there be no jurisdiction in the inferior court, there is none in the appellate, the court of appeals in both of these cases should have remanded these causes, with directions to the county courts to dismiss them. The court of appeals is simply an appellate court. This court, on the contrary, is a court of original jurisdiction. It has the common law power to review the proceedings of all inferior courts or officers, and reverse them for want of jurisdiction. Before the code, its processes of review were writs of error and certiorari. The writ of error is, I insist, merely changed into an appeal; but without the appeal this court would be authorized to bring up the proceedings of any inferior tribunal, by the common law writ of certiorari, which is not taken away by the code. The occasion for a review, in respect to this court, confers the right and the duty. Our jurisdiction does not depend upon the statute giving an appeal; it is original, inherent; it rests upon the constitution, which, with the judiciary act of 1847, retains to it all the original jurisdiction of the court of king's bench, and superadded tc that we have all the original jurisdiction of the court of chancery with its appropriate process. It is a mistake to say of this court that it has not jurisdiction over any wrong done by any judicial or other tribunal, acting under the color or authority of law. It is not true to say of this court that if the inferior court or tribunal had no jurisdiction, this court has none. The absence of jurisdiction in an inferior court is in many cases the very basis of jurisdiction here. We use such process or mode of proceeding as the legislature has prescribed; but where there is a wrong and no specific mode of redress, our duty is an original one, by the application of old principles to new cases. Where the cases speak of the failure of jurisdiction in this court, from a want of jurisdiction in an inferior court, they mean jurisdiction to *adjudicate upon the merits* of the case, and so far the doctrine is true. We could not, on the ground that this court had original jurisdiction of the subject matter for which these actions were brought in the court below

proceed to hear and decide the cases upon their merits. To this extent the doctrine, that the appellate court has no more jurisdiction than the inferior court, is true, but no further. We had ample jurisdiction to reverse these judgments, and to award costs of this court, and of all proceedings in this court; and that is sufficient to entitle the appellants to costs in this court. The decision of the clerk in these several causes, so far as it relates to costs in this court, should be affirmed; but as each party has in part succeeded here, neither should have costs on these motions or appeals. The clerk's adjustment of costs, so far as it allows costs in the Monroe county court, reversed, and so far as it allows costs in this court, affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

22 278
28 522
29 635
41k 568
47a 34

Kent *vs.* The Hudson River Rail Road Company.

A judgment recovered in another court, by the defendant, in a former suit commenced by the plaintiff's agent, for the same cause of action for which a second suit is brought, is a bar to the plaintiff's claim, unless it appears that the former suit was commenced and prosecuted without the plaintiff's authority.

It is also a bar though the former suit was commenced without authority, if the plaintiff has since ratified the agent's authority.

In an action against common carriers, to recover damages resulting from a delay in transporting sheep to market, within the time agreed, any loss sustained by the plaintiff by a fall in the market between the times when the sheep should have arrived, and when they did arrive, is a proper element of damages, to be taken into account by the jury, in connection with other facts and circumstances.

Whether the carriers are bound, as upon an express contract, to deliver property on a particular day, or to deliver it without unnecessary delay, makes no difference; inasmuch as the carriers' duty rests upon contract implied in law. They are bound to transport and deliver the goods within a reasonable time.

MOTION by the defendants for a new trial, upon a case. The action was commenced against the defendants as common carriers, and the complaint contained three counts. 1. For

injuries resulting from a delay in transporting over the defendants' rail road from Albany to New York, eighty sheep, by which delay the sheep were injured and the plaintiff sustained damage by a decline in the market. 2. For damages by reason of unreasonable delay in the transportation of 182 sheep pelts from New York to Albany, by reason of which delay the pelts heated, rotted and were rendered valueless. 3. For delay in the transportation of 71 sheep pelts from New York to Albany, by which delay they were also heated and rendered valueless. The defendants pleaded the general issue, and secondly, to the first count also pleaded that in March, 1853, the plaintiff commenced an action in a justice's court in the city of New York for the same cause of action, to wit, the injury to the 80 sheep, by reason of the delay in transporting them, which action was tried upon the merits, and a judgment rendered for the defendants. The cause was tried at the Ontario circuit in May, 1855, and a verdict rendered for the plaintiff for $507.03.

H. O. Chesebro, for the defendants. I. The judgment in the former suit is a bar. The testimony of Taylor shows that he was the general agent of the plaintiff in the transaction of his business. If Taylor had no direct instructions from the plaintiff to commence the suit, the subsequent ratification of his acts by the plaintiff binds him, the same as though he had instructed him to commence it. (1.) The subsequent assent of a principal will confirm the authorized acts of an agent, so that he will be bound by them in respect to third persons. (*Dunlap's Paley on Agency, n. o*, 171. 1 *Liv. Prin. and Agency*, 391.) (2.) When the principal is informed of what has been done, he must dissent and give notice of it within a reasonable time; if he does not, his assent and ratification will be presumed. (2 *Kent's Com.* (*marg.*) 617. *Id.* 614, *n.* 1. *Benedict* v. *Smith*, 10 *Paige*, 126. *Story on Agency*, §§ 254–6, *and authorities cited. Armstrong* v. *Gilchrist*, 2 *John. Cas.* 423.) The plaintiff being advised of the judgment against him, was bound immediately, or within a reasonable time, to have disaffirmed the acts of his agent in the institution of the suit. Having omitted to do so, the

judgment stands upon the record in a court having competent jurisdiction of the subject matter, conclusive upon the matters involved in it.

II. Was the decline in the market price of the sheep, a proper measure of damages? (1.) When a common carrier receives property to transport, and no contract is made to deliver by a particular time, the law imposes the obligation to deliver in a reasonable time. If there is an actual delivery of the property, the carrier's liability is the same as that of ordinary bailees for hire. (1 *Parsons on Con.* 659.) (2.) The rule is well settled that a wrongdoer is responsible only for the proximate and not for the remote consequences of his acts. Those circumstances must be such as might have been foreseen and expected as the results of his conduct; not those which he could not have foreseen, and was therefore under no obligation to take into his consideration. The damages resulting from his acts, or failure to perform, must be such as it is apparent the parties had in contemplation at the time the contract was made. (2 *Parsons on Cont.* 454, *pt.* 2, *ch.* 7, § 5. *Sedg. on Dam.* 112, 2*d ed.*) They must be the natural and proximate consequence of the act complained of. (2 *Greenl. Ev.* §§ 253–7.)

III. The decline in the market price of sheep was not a proper measure of damages. It was too remote and contingent to constitute a proper element of damages. (*Astley* v. *Harrison*, 1 *Esp.* 48; *Peake*, 194. *Headley* v. *Baxendale*, 9 *Exch. Rep.* 341. *Lawrence* v. *Wardwell*, 3 *Barb.* 423. *Wibert* v. *N. York and Erie R. R.*, 19 *Barb.* 36.)

IV. It is a general rule that profits which the injured party may have made, are not to be included in the injury for which compensation is to be made. They are excluded, because they are too remote and dependent upon contingencies. (*Blanchard* v. *Ely*, 21 *Wend.* 342. *Giles* v. *O'Toole*, 4 *Barb.* 261. *Freeman* v. *Clute*, 3 *id.* 424. *Headley* v. *Baxendale, supra. Black* v. *Baxewell*, 1 *Wels., Har. & Gr.* 410.) The only cases where profits have been allowed, are when they are the immediate fruit of the contract, and may fairly be said to have entered into the contemplation of the parties in making the contract. (*Mas-*

terton v. *The Mayor of Brooklyn*, 7 *Hill*, 61.) The court in that case says, "they are part of the contract itself, *entering into and constituting its very elements;* something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made." (*See also Wilson* v. *York, Newcastle and B. R. R. Co.*, 18 *Eng. Law and Eq. R.* 557. *Watson* v. *Ambergate N. & B. R. R. Co.*, 3 *Law and Eq. R.* 497.)

V. The defendants were not advised that these sheep were to be taken to New York to be sold in the market. Can it be said that they contracted to transport them in view of that market, and assuming the hazard of its fluctuations? Suppose the market had advanced instead of declined, the defendants could have had no benefit from it. As was said by the court in *Wibert* v. *New York and Erie R. R. Co.*, "there was no *natural* connection between the breach of duty and the decline in the market. The damages flowed from the decline in the market, and they are not the result of delay."

VI. The evidence shows beyond dispute that there was no negligence or delay, on the part of the defendants, in the transportation of the 182 sheep pelts, or in the delivery of them. They were transported in the usual time to Albany, where they were consigned. The testimony of Taylor, the plaintiff's agent, shows that he never inquired for the pelts at the proper place—that is, at the freight office—or did any thing to charge the defendants with neglect in the delivery of the property. It is submitted, therefore, that the court should have charged the jury in that respect, as was requested by the defendants' counsel.

E. G. Lapham, for the plaintiff. I. The judgment obtained in the justice's court, in New York, is not a bar to the plaintiff's right to recover under the first count of his complaint. The suit in which that judgment was obtained was not authorized by the plaintiff. Nor did he ratify it. The only circumstance relied upon by the defendants as establishing a ratification is, that it does not appear whether or not the plaintiff,

after he was informed by Taylor of what he had done, notified the defendants that he did not approve of Taylor's acts. This is no evidence of a ratification. The plaintiff was under no obligation to notify the defendants that he disapproved of the unauthorized acts of his agent. He was not informed of those acts by the defendants, nor did they act or rely upon his silence. The authorities cited by the defendants' counsel are not applicable to this case. They hold simply that as between *principal and agent*, long acquiescence without objection, and even the silence of the principal, will in many cases amount to a presumption, sometimes conclusive, of the ratification of an unauthorized act; especially where such acquiescence is *not otherwise to be accounted for*, or such silence is either *contrary to the duty* of the principal, or has a tendency to *mislead* the agent.

II. The decline in the market price of the sheep, between the time when the defendants ought to have delivered them in New York, and the time when they did deliver them, is a proper element of damages. (1.) The defendants promised to deliver the sheep at a specified time—the next Tuesday morning. This promise and the breach of it, are alleged in the complaint. Whatever may be the rule in cases where a common carrier undertakes to convey and deliver goods not perishable, without specifying any time for their delivery, it is not questioned but that where he promises to convey and deliver perishable goods within a limited time, a fall in the market price is a proper item of damage. (*Wilson* v. *York, Newcastle and B. R. R. Co.*, 18 *Eng. L. and Eq. Rep.* 557, *note. Wibert* v. *New York and Erie R. R. Co.*, 19 *Barb.* 36, 48.) (2.) But assuming that the defendants did not undertake to convey and deliver the plaintiff's sheep, *within a limited time*, they were nevertheless obliged by their contract to use due diligence and deliver the sheep in a *reasonable* time; and if, after the expiration of such reasonable time, and before the sheep were in fact delivered, there was a decline in their market value, at the place of delivery, such a decline is a proper element of damage.

This position is denied by the defendants' counsel on the

authority of *Wibert* v. *New York and Erie R. R. Co.*, decided by the supreme court, in the eighth district, at general term. The opinion was delivered by Marvin, J., Justices Bowen and Mullett concurring. The reasoning of the learned justice is briefly this: Nothing can be allowed as legal damages, which is not the *natural* and *proximate consequence* of the act complained of; the decline in the market price of the property was not a *natural* result of the delay of the carrier to deliver it in a reasonable time, and the loss by the decline in price was not a *proximate consequence* of the delay; therefore, such decline and loss cannot be allowed as damages. As to the rule that the damages must be the natural and proximate consequence of the act complained of, the language of the authorities on the subject, and the reasons assigned for the disregard of remote or consequential damages, are far from uniform. (2 *Greenl. Ev.* § 256. *Sedg. on Dam.* 75.) It is sometimes said, in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have *at the time contemplated* as likely to result from the nature of the agreement. (*Sedg. on Dam.* 64.) Within this rule it is clear that the plaintiff is entitled to the damages allowed. Again, it is sometimes laid down as a rule, that damages consisting of a *loss of profits* will not be allowed, whether in cases of contract or of tort. But this rule is taken with many limitations. (*Sedg. on Dam.* 81. *Masterton & Smith* v. *City of Brooklyn*, 7 *Hill*, 61. *White* v. *Mosely*, 8 *Pick.* 356. *Tarleton* v. *McGawley*, *Peake's N. P. Cas.* 205. *Dewint* v. *Wiltse*, 9 *Wend.* 325. *Driggs* v. *Dwight*, 17 *id.* 71.) But however uncertain may be the general rule, it is established that in case of the breach of a contract to *transport goods* to a particular place, where there is an *entire* failure to transport, the measure of damages includes the difference between the price at the point where the goods are, and the place where they were to be delivered, which in fact amounts to *an allowance of profits;* and in actions on agreements for the *sale and delivery of chattels*, a similar result is had by giving the vendee the benefit of the rise of the market

price. Not one of the cases cited by Justice Marvin, for the purpose of showing the application of the rule of damages laid down by him, belongs to either of these two classes. (19 *Barb.* 48.) How is a decline in the market price, occasioned any more directly or necessarily by the breach of a contract to *sell* and deliver goods, than by the breach of a contract to *carry* and deliver them? Justice Marvin says (*p.* 41) the vendee "would have made *as profits* the difference between the price he was to pay, and the value of the article, at the time and place of delivery, and the profits he could thus have made are, in law, his damages. They *result* directly from the breach of the contract, the act complained of." It is difficult to see why this reasoning, if sound, does not apply as well to one case as the other. It is submitted that in neither case does the act of the defendant *occasion the loss*, except by depriving the plaintiff of the opportunity *to avail himself of the state of the market* at the time when the defendant ought to have delivered the goods, and in this way it does occasion the loss, *in both cases.* Again, the learned justice concedes that a decline in the market price is allowed as damages in action against *carriers*, where the goods have been *wilfully* delayed by the carrier, or *embezzeled* or *lost* on the way. Now if in these cases the damages are the *natural and proximate* consequences of the act complained of, upon what ground shall it be held otherwise in the case in hand? The reason assigned by the learned justice is, that "the rule where there has been a *failure to deliver* is a convenient and practicable one, and excludes contingencies. It does not give to the owner of the property the *chance of getting a higher price* by an advance in the market, after the day when the property should have been delivered." (*P.* 44.) In the first place, it is submitted that this supposed "chance" of an advantage is simply a disadvantage to the owner. He is obliged to receive the property whenever it is convenient for the carrier to deliver it, even although it be at a depreciated price, with a falling market, and with the probability that it cannot be sold except at a still further depreciated price. Would the condition of the carrier be improved

if by reason of his delay in delivering the property, he was obliged to retain it, and pay the owner its entire value, or in other words, if he had what the learned justice terms "the chance of getting a higher price" for the property than he was obliged to allow for it? In the next place, there is one class of cases where the owner has the chance of getting a higher price for the property after it should have been delivered, in which the learned judge concedes that the rule of damages we contend for is the true rule; and that is, as we have seen, where the carrier expressly agrees to deliver the goods within a limited time. In reality there is no difference, so far as this question is concerned, between an agreement to convey and deliver goods at a specified time, and an agreement to convey and deliver them within a *reasonable* time. The plaintiff must show what is a reasonable time in order to recover, and that being done, the grounds and elements of damage are the same as if the time thus fixed by the proof had been fixed by the contract.

III. As to the point whether the inquiry which the plaintiff's agent made for the sheep pelts was addressed to the proper agent of the defendants, or as to whether he made a proper demand for them, the charge of the judge at the circuit was as favorable for the defendants as they were entitled to, and was unexceptionable.

IV. The verdict is according to law and the evidence.

By the Court, E. Darwin Smith, J. Two questions are presented for the decision of the court, on the motion for a new trial in this case. 1st. Is the judgment recovered before the justice of the peace in the city of New York, a bar to the plaintiff's recovery in this action? 2d. Was the decline in the market price of the sheep, between the time they should have arrived in New York and the time when they did arrive, a proper measure of damages. On the first point, the judge advised the jury that the judgment recovered in the justice's court in the city of New York, by the defendants, in the suit commenced by the plaintiff's agent, for the same cause of action for which

this suit was brought, was a bar to the plaintiff's claim, unless it was commenced and prosecuted without the plaintiff's authority. And he also instructed the jury that if the suit was commenced without authority, and the plaintiff had since ratified Taylor's (the agent's) authority, it was still a bar. I can see no error in this part of the charge. It was as distinctly in favor of the defendant as the judge could reasonably be expected to make it, on submitting the question, under the evidence to the jury. It was a question for the jury whether the suit in question had been brought or ratified by the plaintiff, and they have passed upon it conclusively. The other point, respecting the fall in the market price of the sheep between the time when they should have been delivered and the time of their actual delivery, is one of more difficulty. On this point the judge charged the jury, that if they found that the plaintiff was entitled to recover any loss sustained by him by a fall in the market between the times when the sheep should have arrived and when they did arrive, was a proper element of damage. This view of the question of damages was more fully amplified and explained; but the judge, in substance and effect, allowed and directed the jury to take the fall in the market value of the sheep into account, in making up their verdict, as a fit and proper basis or element of damages, in connection with other facts and circumstances. That the charge of my brother STRONG was entirely correct in substance on this point I should have had no doubt, but for the very able and elaborate opinion of Judge MARVIN, in the case of *Wibert* v. *The New York and Erie Rail Road Company*, (19 *Barb.* 36.) Ordinarily we should feel ourselves bound to follow an opinion so carefully pronounced at general term; but the decision at the circuit being in conflict with this opinion, we are called upon to decide the point presented for ourselves; and considering the importance of the question, and the likelihood that our decision of it as an open question will tend to hasten its settlement in the court of dernier resort, I will proceed to present such views as have led me, with much diffidence, to dissent from the conclusions of the learned and experienced judge who gives the opinion of the general term of

the 8th district. The complaint in this action states that the plaintiff, on some Monday in the month of March, 1853, delivered to the defendants, as common carriers, 80 fat sheep, which the defendants then and there accepted and received of and from the plaintiff, to be safely and securely carried and conveyed over the route of their said road from Albany to New York city, and to be delivered on the next day, Tuesday, to the plaintiff, in New York. Under the evidence, the jury would have been warranted in finding that the sheep were to be delivered on Tuesday morning. The agent of the defendants said, when they were received by him, that they would be in New York the next morning at 4 o'clock, and they did not arrive till Thursday morning. Whether the defendants were bound as upon an express contract to deliver the sheep on Tuesday morning or to deliver them without unnecessary delay, can make no difference; for the carrier's duty rests upon contract implied in law. (*Edwards on Bailments*, 466.) He is bound to transport and deliver the goods within a reasonable time. (*Id.* 521, 4, 5.) But here there was a time specified when the goods were to be delivered, and that time corresponds with the time when they should be deliverd in the ordinary course of the business of the defendants. It is apparent upon the facts of this case, and the jury have so found, that the plaintiff actually sustained a loss from the non-delivery of the sheep according to the contract, or according to the custom in respect to the time required or employed in the transportation of such articles, to the amount claimed, $125. This damage, in the aspect in which the point is presented, resulted from a fall in the market value of the sheep, between Tuesday morning and Thursday. The damages to be recovered, Judge MARVIN says, must always be the "*natural and proximate consequences of the act complained of*," and cites 2 *Greenl. Ev.* 253, 254, 256; 5 *Wend.* 538; 6 *Hill*, 648, and *Sedg. on Damages, ch.* 3; and he argues that the fall of price in the market was not a *proximate consequence* of the delay of the carrier in making the delivery. He says, "the damages flowed from the decline in price, and they are not the result of the delay." Again, the learned judge says, "The question is

what connection or relation was there between the act complained of and the decline in the market in the price of butter;" and again, "But how it can be argued that a decline in price is a consequence of the non-arrival of the article, I am not able to comprehend." Also, "There was no natural connection between the breach of duty by the defendant and the decline in the price of the butter in the market." The theory of damages as suggested and involved in these extracts from the opinion of the learned judge is, that the damages properly recoverable in an action must be the direct and immediate consequence of the injury or breach of duty complained of. The rule of damages thus enunciated belongs to the large class of injuries, direct and immediate, for which, under the old nomenclature, the action of trespass was the appropriate remedy, and practically ignores the large class of consequential injuries for which trespass on the case or assumpsit was the proper form and name of the action. The first case which the learned judge cites upon this theory of damages is *Davis* v. *Garret*, (6 *Bing*. 716; 19 *Eng. Com. L.* 321.) In that case the action was for the loss of 114 tons of lime, received by the defendant on board of his barge or vessel, to be carried and conveyed on board said vessel from Blinby Cliff, in Kent county, to the Regent's canal, in Middlesex. It appeared, on the trial, that the defendant deviated from the usual and customary way and course of the voyage, without justifiable cause, and that, in consequence, the vessel became exposed to a great storm at sea, in which the lime was heated and the barge caught fire and was lost. A verdict was found for the plaintiff, and a rule obtained, nisi, for a new trial. The argument of the learned sergeant, Taddy, for the defendant was, "That the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the tempest if the barge had proceeded in her direct course;" precisely as Judge MARVIN holds that the delay in delivering the butter did not cause the decline in the market. The deviation of the master from the course did not produce the storm, and the storm caused the loss of the barge

and the lime. The learned Judge Tindal, C. J., says, "But the objection taken is, that there is no natural or necessary connection between the wrong of the master, in taking the barge out of its proper course, and the loss itself; for the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But if the argument were to prevail, the deviation of the master, which is undeniably a ground of action against the owners, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured in her proper course. And yet, in *Parkes* v. *James*, (4 *Camp.* 112,) where the ship was captured while in the act of deviation, no such ground of defense was ever suggested." The verdict was sustained. This case seems to me to confute the theory that damages must be *proximate*, in the sense in which these terms are used by Judge MARVIN. This case holds that the plaintiff may recover for indirect or consequential damages which result from a breach of duty or a breach of contract, and that it is not essential that the breach of duty in the carrier, or the non-performance of his contract, should be the immediate and direct cause of the damage, but only that the damage should be the immediate and direct result of the violation of the duty or breach of contract, which is quite a different thing. The learned judge also cites the case of *Bracket* v. *McNair*, (14 *John.* 170,) and *O'Conner* v. *Foster*, (10 *Watts*, 418,) and holds that they are inapplicable to the case. These cases seem to me applicable to this extent, that they both apply to a common carrier, who fails to deliver property according to his contract, the same rule of damages that applies between vendor and vendee; that is, the difference between the contract price at the place of purchase by the vendee and of shipment by the carrier, and the place and time of delivery. In the case in *Watts*, Sergeant, J. says, "The defendants were bound by their contract to transport the wheat from Pittsburgh to Philadelphia, and have shown no legal excuse for refusing to do so. The question is, what is the measure of damages to be paid by the

carrier for violating such a contract. The defendants have not fulfilled their contract, and they ought to place the plaintiff in the same situation as if they had fulfilled it. They ought to be indemnified. The wheat was a consumable article of merchandise at its port of destination, calculated for sale in the market there, where the price fluctuates from day to day and sometimes from hour to hour." This was the precise case with the butter in *Wibert's case*, and the sheep in this case, fatted as they were expressly for the New York market, and designed to go into the daily consumption of that city. The learned judge further says, "The market value of the article there, at the time it would probably have arrived and been ready for sale, is what it would have been worth to the plaintiff; and the difference between that and the value at the place of shipment, added to the cost of freight, is the amount of loss which the plaintiffs have sustained. Such is the well established rule between vendor and vendee. (7 *Hill*, 74. *Dey* v. *Dox*, 9 *Wend.* 129. 2 *Barn. & Cress.* 629.) The difference between the contract price and the market value at the time and place of delivery is the measure of damages in all cases of sale of merchantable commodities between vendor and vendee; except that the carrier is entitled to deliver, and the owner is bound to receive, the property, after the time fixed for the delivery by the contract, or the reasonable time necessarily employed in it transportation, in the absence of any express contract. The analogy and the reason of the rule is perfect as between the carrier and the owner, as between vendor and vendee. And the rule was practically so applied in *Smith* v. *Griffith*, (3 *Hill*, 333.) This was as an action on the case, against the carrier, for damages arising from delay in the delivery of mulberry trees, or seedlings. The trees were delivered to the defendant at Troy, April 22, 1839, for transportation to Lyons, Wayne county. After delivery they were allowed to remain at Troy till the 24th day May following, and were then forwarded to, and received by, the plaintiff about the first of June afterwards, when they were found to be considerably damaged. The question was, what damages the plaintiff was entitled to recover. Considerable

conflicting testimony was given at the circuit in regard to the market value of the trees at the time of the injury, and the plaintiff had a verdict of $12.50. The defendant on the trial sought to mitigate damages, by showing that subsequent experience had shown that the trees were of little or no intrinsic value at the time of the injury, and that the prices at which they were held and sold in the market at the time of the injury, were fictitious and inflated. Speaking of this evidence, on the motion for new trial, Judge Nelson says: "All this evidence, I am of opinion, was properly rejected, as having no legitimate bearing upon the question. The damages to which the plaintiff is entitled, if any, should afford an adequate indemnity for the loss sustained at the *time the injury happened*, and the admission or rejection of evidence should be regulated with a view to produce this result in the opinion of the jury. If the goods are wholly lost or destroyed, the owner is entitled to their full worth at the time of such loss or destruction. In trover the measure of damages is the value of the goods at the time and place of conversion, with interest, and perhaps at any time between that and the trial. (14 *John.* 128. 3 *Cowen*, 82.) And, upon the same principle, if goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in that proportion. Assuming that there is no defect in the quality, the fair test of its value, and consequently of the loss to the owner, is the *price at the time in the market.*" This case, in its facts and in the principle upon which it is decided, is quite in point in opposition to the opinion in *Wibert's case*, and in confirmation of the charge of my brother STRONG, at the circuit, in the present case. The damages for which the carrier was held liable, resulted from the delay of the carrier in the delivery of the trees within a reasonable time after their receipt. It was not a case of contract. The measure of damages was the deterioration of the property between the time when it should have been delivered and the period of its actual delivery, with reference to the market value when it should have been delivered. The owner received the property as in this case and in the case of *Wibert*, and

as he was clearly bound to do. (6 *Hill*, 588. 2 *Kernan*, 509. *Parsons on Contracts*, 659.) Delay in the delivery is not a conversion by the carrier. (*Idem.*) If the loss from the deterioration of the property in its market value, between the time when it should be delivered and the time of the actual delivery, be the true measure of damages when there is a partial injury to the property, it must be the true measure of indemnity where there is unreasonable delay in the delivery. I can conceive of no reason for a distinction between the cases. It is the loss which the party suffers from the breach of duty or breach of contract of the carrier. The carrier is in fault for his negligence or failure to perform his contract, and the owner suffers loss. This is the adequate indemnity for the loss sustained, spoken of by Judge Nelson. The failure to deliver in a reasonable time may fitly, for the purpose of damages, be deemed a partial conversion at that time and for the time being. To the extent of the loss or injury, it is a practical conversion from that time till the period of delivery. The owner is bound to receive property when delivered, but if it is then depreciated in value in the market, there can be no other rule than that the carrier must make up the loss. The case of *Scovill* v. *Griffith*, (2 *Kernan*, 509,) it seems to me, virtually affirms the same view of the question of damages. This action was against the carrier, claiming to recover the value of several boxes of merchandise, in consequence of the unreasonable delay of the carrier in delivering them. At the trial before Justice Edwards the jury were charged that the rule of damages, when the goods were not delivered within a reasonable time, as was this case, "would be the difference between the highest market price of the goods when or after they should have been delivered, and the time when they were actually tendered, and the expense the plaintiffs were put to by the delay." To this portion of the charge there was no exception. In the opinion of Judge Hand, in the court of appeals, he says, speaking of the delay in the delivery of the goods, "This was inexcusable, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the *natural con-*

sequences of the neglect;" and he says, "When there has been deterioration and loss, the carrier is liable;" and he cites 6 *Bing.* 716; *Davis* v. *Ganit*, (*supra;*) *Ellis* v. *Free*, (8 *John.* 531;) *Story on Bailments*, § 588. In the opinion of Judge Gardiner he refers to the charge of the judge in regard to the damages, in the way of approval, and also in another part of his opinion he says: "When there is an omission to deliver property in a reasonable time, the owner is entitled to a full indemnity, and refers to the market value as one of the circumstances entering into the element of damages." No doubt seems to have been suggested in this case but that the charge of the judge at the circuit on this point was right. The principle of these cases casts upon the carrier the loss arising from depreciation of the property, while the same remains in his his hands after the period when it should be delivered. The case of *Wilson* v. *The York, Newcastle and Berwick Railway Co.*, (18 *Eng. Law and Eq. Rep.* 553,) is a case of the loss of profits consequent upon the neglect of the carrier, or failure to comply with his contract in regard to the delivery of fish, designed for the London market. This case, in this aspect, would perhaps warrant a recovery in the present case for the damages demanded as the loss of profits on the sheep, but it at least is authority for the loss arising from the depreciation of the property in the market, consequent upon the unreasonable delay of the carrier in its delivery. It appears in the case of *Wibert*, that between the time when the butter with reasonable diligence, might have been delivered in New York, and the time when it was actually delivered, the price of butter had declined four cents a pound in the market. In respect to this difference in price the learned judge says: "Suppose that we admit this brings the case within the rule of resulting damages, and that the loss was the consequence of the negligence, and the question will then be presented, were the damages *proximate*?" He then reasserts that the proximate cause of the loss was the decline in the market; and in another part of the opinion he says, "I find it difficult in this case to consider this part of the rule as to damages im-

mediately resulting from the act complained of, as I have been unable to see that the fall in the market price of the butter resulted at all from the breach of duty by the defendant. This must be established before we can fix our minds upon the question of proximity or remoteness," and he refers to *Masterton* v. *Mayor of Brooklyn*, (7 *Hill*, 67,) and cites from the opinion of Judge Nelson, that "remote and contingent damages depending upon successive schemes or investments are never allowed for a violation of a contract." This is all true; but in that case it was held that the party was entitled to recover in damages the *fruits of his contract*—what he would have realized if the contract of the other party had been performed. The loss of profit was contingent—was not a necessary consequence of the breach of the defendant's contract, and in this sense was not proximate, more than the loss of Wibert was proximate upon the neglect of the rail road company to deliver the butter within a reasonable time. No damages necessarily resulted from the refusal of the city of Brooklyn to receive the marble, in the case of Masterton, more than from the delay of the rail road company to deliver the butter, in the case of Wibert; and yet in both cases the damages to the plaintiff resulted from, or were consequent upon, the refusal or neglect in question. If the proximity of the injury to the damages must be so intimate in the relation of cause and effect that the injury immediately and necessarily produces the damages, or must do so to sustain an action without the intervention of any immediate cause or agencies, the rule would exclude a recovery in all such cases as that in *Masterton* v. *The Mayor of Brooklyn*, and indeed in all cases except for injuries of force or of palpable connection. The rule that the action can only be sustained for the damages which are proximate, as stated by the learned judge, is one of a general character and of universal application. It must apply with equal force between vendor and vendee, and in all cases of nonfeasance or for consequential injuries. If a man digs a pit in the street in front of his house, and his neighbor falls into it and break a leg or an arm, the digging of the pit would not be the proximate cause

of the injury, as the learned judge states the rule, for the digging of the pit would not cause the neighbor to fall into it, more than the neglect of the defendant in the suit of Wibert to deliver the butter caused the decline in the price of butter in the market. So if a man lets a horse loose in the street, and the horse in wildness and fury causes another horse to break loose and run over a man and break his wagon or his leg, it might be said that letting the first horse loose was not the proximate cause of the breaking of the wagon or the leg by the second horse, but this would not do; the injuries must be traced to the primal cause, even though there be several intermediate links in the chain of cause and consequence. There might not be any loss to the plaintiff in the case of *Masterton* v. *The Mayor of Brooklyn*, from the refusal of the defendant to receive the marble. That was, as Judge Marvin says in respect to the non-delivery of the butter, *contingent;* but the contingency in such cases must be at the risk of the party who is guilty of a breach of contract or a breach of duty. If there be no loss there can be no damage, and no action could be sustained, or at most the damages would be merely nominal. The case in 7 Hill does hold, and very properly, that individual schemes of profit or speculation are not legitimate items of damage; but nothing of that kind was claimed in the case of Wibert or in this case. The damages, as claimed by the plaintiffs, were predicated upon the general market value of the property, and its depreciation in the market at large, from the time it should be delivered till the time of the actual delivery. If the rule of damages in such cases as the present be not as stated by my brother STRONG to the jury, on the trial of this cause, I am entirely at a loss to determine what it is, and the learned judge who gives the opinion in the case of Wibert has failed to lay down the true rule. If the learned judge had tried this cause at the circuit, I suppose he would have told the jury, assuming that the defendants had been guilty of negligence as claimed, that the plaintiff was only entitled to nominal damages. Confessedly from the neglect or default of the defendant in not delivering the butter within a

reasonable time, according to his contract, express or implied in law, the plaintiff had lost the opportunity to sell his property at the market price when it should have been delivered, and it had depreciated in value before it came to his hands. The learned judge holds that this is *damnum absque injuria.* I cannot agree with him. The principle which measures damages at common law is that of giving compensation for the injury sustained—a compensation which shall put the injured party in the same position he would have stood in had he not been injured. (2 *Parsons on Cont.* 432. *Co. Litt.* 257, *a.*) Now within the principle here stated, of giving a compensation for the injury sustained—a compensation which shall put the injured party in the same position in which he would have stood had he not been injured—what other rule can be applied to make him whole and indemnified for the defendants' breach of duty or default, but to hold him to make good the loss from the depreciation of the property from the time it should have been delivered till it was delivered? This is a simple, plain rule, easily applied, and the only one which will afford a full indemnity. The learned judge who tried this cause at the circuit left the case to the jury, in a proper and judicious manner. He told them that the fall in the market between the times when the sheep should have arrived and when they did arrive, "*was a proper element of damage;*" that the loss resulting from the delay, by preventing the plaintiff from availing himself of the market, was a proper subject for their consideration in estimating the amount of damages. The jury were directed to take the whole subject into consideration and give such damages as were just, in view of all the facts of the case.

The verdict was right, and a new trial should be denied.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

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CARHART and others *vs.* THE AUBURN GAS LIGHT COMPANY.

Any person interested in the use and enjoyment of the water of a running stream is entitled to receive it pure and uncontaminated; and he may maintain an action for any special injury sustained by him in consequence of the corruption of the water by any other person.

Accordingly, where the plaintiffs, who were carpet manufacturers, occupied premises situated on the Owasco river, and had the right to use the waters of the river for supplying their works, and the defendants, who were engaged in manufacturing gas upon and near said stream, above the plaintiffs' works, suffered to flow from their gas works into the river certain noxious and offensive substances and materials, and certain tarry and oily substances, which became mingled with the water and adulterated the same as it flowed to the plaintiffs' works, and injured the wool and other materials used by them, *it was held*, that this was an injury for which an action would lie, by the plaintiffs.

And this, notwithstanding the defendants claimed exemption from damages and liability on the ground that the soil on which their gas works were situated was incompact and pervious, and was percolated by the water of the river, without their agency or fault; and that if any noxious substances had flowed from their works into the river it had been by the percolation of the water into the ground occupied by them, and the reflux of said water into the river intermixed with such offensive substances as escaped from the gas works into the ground, in the ordinary course of business, and without any neglect or design of the defendants.

Gas works, *it seems*, are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied; and whenever they create a special injury they are to be regarded as a *private nuisance*, and an action will lie in favor of the person sustaining the special injury.

APPEAL by the defendants, from an order made at a special term, allowing a demurrer to the answer. The complaint stated that the plaintiffs were carpet manufacturers, and occupied premises situated on the Owasco river, in Auburn, and had the right to enjoy the advantages of the water of the river, for supplying their works with unadulterated water; yet the defendants, manufacturing gas upon and near said stream, and above the plaintiffs' works, intending to deprive them of the water in its pure state, had suffered to flow from their gas works, into said river, certain noxious and offensive substances and materials, and certain tarry and oily substances, which became

mingled with the water and adulterated the same as it flowed to the plaintiffs' works, and was necessarily used by the plaintiffs in the process of manufacturing, and injured the wool and other materials used by the plaintiffs. The defendants answered, that the ground on which their works are situated is incompact and pervious, and is percolated by the water of the Owasco river, without their agency; and if any noxious substances have flowed from their works into said river, as stated in the complaint, it has been by the percolation of the water into the ground occupied by the defendants, and the reflux of said water into the river, intermixed and blended with such resinous, tarry and oily substances as escaped from the defendants' works into said ground, in the ordinary course of business, and with careful management, without any neglect, design or intent by the defendants to corrupt said waters. The plaintiffs demurred to this portion of the defendants' answer, and stated two grounds of demurrer. 1st. That the defendants, while assuming, in that part of their answer, to set forth a full justification of the acts complained of by the plaintiffs, had not stated facts sufficient to constitute a legal defense to this action. 2d. That the defendants had not shown that the waters of the Owasco river would have been injured, corrupted or adulterated, as stated in the complaint, if the gas works of the defendants had not been located upon the premises, and the manufacture of gas light had not been carried on by them as stated in the answer. The court, at a special term, gave judgment for the plaintiffs on demurrer, with leave to the defendants to amend on payment of costs.

A. G. Beardsley, for the plaintiffs. I. Every riparian proprietor has a right, inseparably annexed to the soil, to use the water running through his land, for every useful purpose to which it can be applied, as it is wont to run, without diminution or alteration. The defendants admit the erection of their gas works on the bank of the river, above the plaintiffs' premises; that the ground on which their works stand is very pervious, and is percolated by the water of the river; they do not deny

that noxious, offensive, tarry and oily substances, emanating from the gas works, flow from said works into the river; they admit that it is occasioned by the percolation of the water, and its return into the river, intermixed with such resinous, tarry and oily substances as may have escaped into the ground in the ordinary course of their business; and they do not deny that thereby the water of the river is rendered corrupt and adulte rated, and unfit for the plaintiffs' use; hence it is insisted that this part of the defendants' answer furnishes no defense to the action. (*Angell on Water Courses*, 142, § 136. *Norton* v. *Scholefield*, 9 *Mees. & Welsby*, 565. *Howell* v. *McCoy*, 3 *Rawle*, 397. *Wright* v. *Williams*, 1 *Mees. & Welsby*, 77. *Tyler* v. *Wilkinson*, 4 *Mason*, 397. *Thomas* v. *Brackney*, 17 *Barb.* 654.)

II. The allegation in the answer, that the reflux of the water into the river, carrying with it the noxious, tarry and oily substances, was without any neglect, design or intent on the part of the defendants to corrupt the waters, to the injury of the plaintiffs, cannot avail the defendants, as they acknowledge acts, of which such is the direct and inevitable result. They must be held to intend what their acts necessarily produce.

B. F. Hall, for the defendants. I. The facts set forth in the defendants' second plea to the plaintiffs' complaint, constitute a legal defense to this action. The legal right of the defendants to occupy, enjoy and use the grounds on which their gas light factory is situated, in the way and manner that shall best accord with their own interests, is limited and qualified only by their legal obligations to their neighbors and other members of community. Their legal obligations to their neighbors and other members of community are, that they shall occupy, enjoy and use those grounds for the prosecution of their business in a "reasonable" manner. And to determine what is a reasonable manner of occupancy, enjoyment and use of grounds in a given case, the date of the occupancy with respect to the date of the occupancy of other grounds by complainants, the peculiarities, if any, of the grounds occupied, their exposure to the action of

the water of a neighboring stream, the extent to which such stream by the force of the laws of gravitation inevitably receives the sewerage of the town, the voluntary exposure and risk assumed by those who planted themselves below the grounds of which they complain, the nature and character of the business carried on upon the grounds in question, and also that carried on by others, the exercise or non-exercise of wanton carelessness on the one hand, or reasonable diligence and care on the other, together with the nature and extent of the action, upon the grounds, of foreign agencies which are beyond the control of the occupants, must be considered. All these must be considered, because they underlie and surround the occupancy and use, and give to them their legal complexion and character. To exclude them from a given case would be to veil the subject from the rays of the only light by which its reasonableness or unreasonableness may be perceived. For to determine what is reasonable in respect to men and things, we must know the attending circumstances. What is reasonable, is that which is reasonable under the circumstances. The defendants claim the protection afforded by the common law as laid down by Sir John Comyns: "That an action on the case for a nuisance does not lie for a reasonable use of one's right, though it be to the annoyance of another." (*Comyns' Digest*, 215, 305.) And to illustrate the term reasonable, the baron cited the following cases, where the occupancy was reasonable, and where an action consequently would not lie. The case of a man who dug cellars in his own grounds, and thereby caused the walls of a house situate upon adjoining land to fall down. (1 *Sid.* 167. 2 *Roll.* 565, *l.* 5.) The case of a man who dug a ditch in his waste within 36 feet of the highway, into which the horse of another fell. (1 *Roll.* 88, 30. 2 *Cro.* 159.) The case of a man who used water in his land out of a water course running through his land to the pond of another, whereby the water in the pond was diminished in quantity. (*Per St. John at Suffolk Assizes*, 1657.) This elementary doctrine has been repeatedly illustrated and applied by American courts. In the case of *Palmer* v. *Mulligan*, (3 *Caines*, 313,) where a man had erected a dam on his own

land, by which at certain seasons he withheld the water from the mills below, to the injury of their owners, Chief Justice Spencer held that the act of erecting a dam by the defendant was lawful; and though in its consequences it was injurious to the plaintiffs, they were remediless. It was *damnum absque injuria*. Many injuries are inevitable from the establishment of one dam above another upon the same stream, such as the increase or decrease of the velocity of the current, evaporation, decrease of the quantum of water below; and yet they are *damnum absque injuria*. (3 *Caines*, 313.) In the case of *Clark* v. *Foot*, (8 *John.* 421,) it was held that a man is not liable to an action on the case for setting fire to his own fallow ground, even though the fire run into and burn the woodland of his neighbor, where there is no negligence or carelessness. In the case of *Platt* v. *Johnson & Root*, (15 *John.* 213,) which was an action for withholding water by a dam above the plaintiffs, the remarks of Justice Spencer, in the case of *Palmer* v. *Mulligan*, are recognized by Justice Thompson as expressing the true rule. A man is not answerable in damages for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part. He may open and work a coal mine in his own land, though it cut off an underground stream of water which before supplied his neighbor's well, and thereby leave the well dry. (*Acton* v. *Blundell*, 12 *Mees. & Welsb.* 63, 24.) A man may build on his own land, though it stop the lights of his neighbor, and even though he build for the very purpose of stopping those lights. (*Mahan* v. *Brown*, 13 *Wend.* 261. *Parker* v. *Foote*, 19 *id.* 309.) A man may dig a pit on his own land be it never so deep, though the house of his neighbor be undermined thereby and fall into the pit. (*Panton* v. *Holland*, 17 *John.* 92.) The owners of a church edifice are not entitled to an injunction to restrain the owner of land, within six feet of the walls, from digging a cellar sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church. (*Lasala* v. *Holbrook*, 4 *Paige*, 169.) No action lies for injury to a house on a hill having a foundation sunk

fifteen feet below the ancient surface of the ground, by reason of digging an adjoining lot to the depth of 30 feet below the natural surface. (*Thurston* v. *Hancock*, 12 *Mass. R.* 220.) No action lies for damages occasioned by excavations for the purpose of opening a street through adjacent lands, which, by reason of the removal of natural supports, permitted plaintiff's land to break away and fall into the pit below. Cities could not be built under an adverse doctrine. (*Radcliff's Ex'rs* v. *Mayor &c. of Brooklyn*, 4 *Comst.* 196.) Where a man dug a well on his own land and thereby appropriated the subterranean water course to his own use, to the injury of his neighbor's well, it was held that the injury was not actionable unless done with malicious intent. (18 *Pick.* 117.) Where a man had a reservoir on his land which filled by percolation, and another dug one on his land, and by percolation it reduced the water of the former, it was held not to be actionable. It was further held, that the law of surface streams does not apply to percolating water or subterranean water courses. (20 *Conn. R.* 542.) From these cases we learn that actions will not lie for injuries sustained by the acts of others who are reasonably and carefully using their own premises; moreover, that the meaning of the term *reasonable* must be ascertained, not by any arbitrary lexicography, but by the facts and circumstances and necessities of each particular case. The plaintiffs, for example, are engaged in a species of manufacturing, which is eminently necessary and laudable; and they employ the waters of the Owasco river in propelling their looms, and washing and coloring their wool and yarn. They bring to their works large quantities of coal for fuel, oil for greasing their machinery, and wool and dye woods for coloring; all these, when used in the most careful manner, intermix with and soil, to some extent, the waters of the stream which flow onward to the paper mill below. The smoke from their chimneys, and the steam from their kettles and dry-rooms, escape to and condense in the atmosphere and fall upon the lately washed and drying linen hanging in the yards of their neighbors. Some trifling damage results. Yet as a certain extent of such damage is the inevitable consequences of that kind of business

in a town, and of the aggregation of other people and other interests in the neighborhood, it becomes necessary to glean from all these circumstances the wholesome, sensible, solid definition of the word "reasonable," in reference to their occupancy and use of their premises. The defendants, unlike the plaintiffs, are not directly upon the bank of the stream; are not propelling machinery with, nor are they in any direct manner mingling their business with and soiling, the water thereof. Between the stream and the defendants' works there is located a road-way 20 feet broad which belongs exclusively to, and is controlled by, the state of New York. On a small piece of ground, at its nearest point, 20 feet distant from the stream, the defendants receive from time to time, in barrels, and manufacture into an inflammable vapor for lighting the town, considerable quantities of rosin. As well the obvious pecuniary interests as the legal obligations of the defendants to the plaintiffs, and the community, require of them the exercise of the *reasonable* care averred in the plea, that none of this is wasted, either upon the ground or in the waters of the creek. Nevertheless, it must be presumed that in receiving and opening this rosin with the most sedulous care, infinitesimal particles of the gum do fall upon the ground, and are dissolved into the soil by the ordinary rains. The quantity is trifling indeed, and very insignificant, even though it were all cast into the creek, which is not the case, yet the plea admits that *some* of this rosin does inevitably fall upon the defendants' ground in the handling. The plea repels the idea of neglect or want of careful management in this particular. It moreover avers that the emanation of said resinous substance is occasioned by foreign causes, against the defendants' wishes and interests, and without their procurement or agency. The import of this plea therefore is, that the injury complained of by the plaintiffs is not the result of any act or negligence of the defendants, but is the inevitable consequence of the manner in which the state of New York causes the Owasco river to ebb and flow in the prison dam. The state of New York causes or permits all the mischiefs of which the plaintiffs complain. Here we reach the precise point on which we rest our defense. We

claim exemption, under the circumstances, from the consequences resulting exclusively from the act or neglect of the state of New York. The plea avers "that the damages alleged in the plaintiffs' complaint, resulted from the percolation of the water of the Owasco river through the soil or grounds adjacent to the said river into the grounds occupied by the defendants' gas light works, and the reflux or return of said water into said river from the grounds so percolated, intermixed or blended with such resinous, tarry or oily substances as escaped into said grounds by accident, or in the ordinary course and operation of said business at said works, and in the ordinary and *careful management* thereof, and without any *neglect, design or intent*, on the part of the defendants, to corrupt the waters of said river, to the injury of the plaintiffs." We insist that this, under the circumstances, constitutes a defense. Let it be premised, however, that the idea of this intrusion of water, now under consideration, should not be confounded with those instances, in the books, of mere influencing or superinducing causes of trespasses, such as conspiracies, instigations to violence, intoxicating liquors, &c., for in those cases the rule for fixing legal responsibility is different from that in the present case. The case at bar discloses not a mere influence—not a mere superinducing cause—but a tangible substance, belonging to the state, in the use of the state, set in motion by the state, which enters our close at the instance of the state, and carries away our rosin through lands of the state into the prison dam of the state. This water—this tangible substance—although it have "neither ears, nor eyes, nor understanding," possesses dimensions and capacity; and when set in motion by the officers of the state, it has the "power" to transfer itself through twenty feet of highway belonging to the state, into our close—to drink up articles of pine gum therein—and then to return again, with its plunder, to the place whence it started. And it performs the act with the same practical effect as if it had "ears, eyes and under standing," and held the office of agent of the state prison at Auburn. Would it be adjudged that we were liable to the plaintiffs for these pretended damages, if the plea alleged that

the agent of the state prison himself, or by human hands, entered our close, and carried therefrom our rosin to the creek, without our connivance, assistance or consent? Certainly not. Where, then, is the difference in principle between an act performed with human forces, and one performed by automatic forces, if each produces the same mischiefs, and occasions the same kind of damages to persons and property? We can perceive no difference; and therefore insist that there is none. This water, whilst it is upon the land of the state, is, to all legal intents and purposes, the automaton of the state, moving at the behests of the state, and charging the state with the consequences of its depredations. If it be said that the state of New York is vested with the sovereign or other valid right to dam up this water, and to fill and empty the prison reservoir at pleasure, we answer, that any privilege, in that respect, which the state may enjoy, does not charge the defendants with liability. If it be said that it is the duty of the defendants to interpose barriers against this water, we answer, that we do not occupy up to the bank of the creek, where alone a water tight wall could be erected. The state of New York, however, does own the bank of the stream, and can interpose such a barrier on its own land. If it be said that the defendants' manufactory is a noxious trade or occupation, we answer, that the allegation is untrue. The rosin used there is a clean and wholesome commodity. And it is as harmless as the maple syrup drunk by Brainard's cow, in the case reported in Cowen. (1 *Cowen*, 78.) The case of *Bush* v. *Brainard*, only decides that Bush was not liable for the value of the cow, which died of drinking his maple syrup, because the cow was in his sap-bush of her own wrong. Could the plaintiffs have recovered of Bush, had the cow, instead of drinking the syrup, caught up a pail of it with her horns, and deposited the same upon their wool or yarn? Certainly not. The court would have laid the damages upon the owner of the cow. The pleadings show that the plaintiffs went into possession of "Barber's Carpet Manufactory," 1 year and 9 months after the defendants established their gas light works. It will be admitted by counsel that this action is in the nature

of an action for a private nuisance, to recover damages for that which existed when they hired and went into possession of their premises. Viewed in the light of proceedings on account of a private nuisance, the plaintiffs are without a remedy as against the defendants. They are inhibited by the subsequency of their possession. The people are never estopped, because they exercise sovereign power. Individuals are estopped whenever they seek advantages from their own follies or wrongs, or unnecessarily expose themselves to injury from existing causes. A. erects on his own premises and uses a machine shop, from which issues smoke, cinders and disturbing sounds. The business is lawful and laudable. B. afterwards voluntarily hires or purchases the lot adjacent, and appropriates it to an object so incompatible with the business of the machine shop as to render the latter a nuisance to him. He exposed himself to the injury unnecessarily; and the law denies him a remedy. In Ohio, it was held on trial of an indictment for establishing a noxious trade near certain dwellings, that it was competent for the defendant to *prove in bar of the prosecution*, that the dwellings were erected after the establishment of the alleged nuisance. (*Ellis* v. *State*, 7 *Blackf.* 534.) For this, as well as the reasons before assigned, the plaintiffs are *damnum absque injuria.*

II. It was not necessary, in the law, for the defendants to aver in their plea that the waters of the Owasco river would have been injured, corrupted or adulterated, as stated in the complaint, if the gas works of the defendants had not been located upon the premises stated in their said answer, and the manufacture of gas had not been carried on there. The second ground of demurrer to the defendants' plea is without legal force, unless the facts constituting the defense are, from their nature, insufficient, without such an averment. Here they are sufficient to bar the action without. If the plaintiffs are without a remedy against the defendants, for any or all the reasons assigned in this argument, it does not follow that such an averment would alter their liability. If they have a remedy against the defendants without such an averment, they would have it

with it. And if the court determine that the state of New York, under the pleadings, is the party liable, an averment to the effect required by the demurrer would be worse than useless. It was necessary that the plea should state a defense. The pleader submits that it contains three defenses, either of which are sufficient to bar the action, viz: (1.) That the defendants were in the reasonable occupancy and use of their premises and materials, as was their right. (2.) That the damages sustained by the plaintiffs were caused, not by the defendants, but by the state of New York. (3.) That the plaintiffs are barred from prosecuting the defendants for a private nuisance, by the subsequency of their occupation. If these are defenses, or if all taken together constitute a defense, or if a defense can be stated without averring that the plaintiffs would have been injured, if the defendants had not established their works on these premises, the second ground of the plaintiffs' demurrer is invalid.

III. As the answer demurred to does not set up a counterclaim, it is not subject to demurrer, under sections 153 and 156 of the code. This point is made on the authority of decisions of judges at special term; and although the position has been overruled in this district, the defendants desire it to be noticed in the decision of this case. And let it be remembered, in the decision of the case, that the law of surface streams does not apply to percolating water nor subterranean water courses.

By the Court, E. DARWIN SMITH, J. The legal maxim, "*sic utere tuo ut alienum non lædas*," which is but the gospel rule of morality, "of doing to others as we would that they should do to ourselves," lies at the basis of this action. The principle is a sound and beneficial one. The difficulty is with its application.

The principle implies what the law asserts, that equality is equity; that all men have equal rights before the law. Dominion over property, an equal right to its use and enjoyment, is common to all; and an action in respect to property will only lie where one unjustly invades another's right. Up to

this point the power of every citizen to use and control his own property is absolute and unqualified. The rule in respect to such use of property as our law allows, is well stated in *Radcliff's Ex'rs* v. *Mayor &c. of Brooklyn*, (4 *Comstock*, 202,) by Judge Bronson, as follows: "The law gives every man such title to his own land that he may use it for all the purposes to which such property is *usually applied*, without being answerable for consequences, provided he exercises proper care and skill to prevent any unnecessary injury to the adjoining land owners." In the case of *Hay* v. *The Cohoes Co.* (2 *Comstock*, 162,) Judge Gardiner states the rule substantially to the same effect. He says, "The defendants could not pollute the air upon the plaintiff's premises, (*Morley* v. *Pragnell*, *Cro. Car.* 510,) nor abstract any portion of the soil, (*Roll. Abr.* 568, *note*, 12 *Mass. R.* 221,) nor cast any thing upon the land, (*Lambert* v. *Berry*, *Sir T. Raym.* 421,) by any act of their agent, neglect or otherwise; for this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a *reasonable manner*, *according to their pleasure.* If the exercise of such a right, upon their part, operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be *damnum absque injuria.*" But the rule, as stated also by Judge Bronson and Judge Gardiner, requires one other qualification, which is made by Judge Woodworth in the case of *Panton* v. *Holland*, (17 *John.* 96.) It is, aside from the question of negligence or unskillfulness, that "the act in question be not done maliciously." Judge Woodworth well says: "In the exercise of a lawful right a party may become liable to an action, when it appears that the act was done maliciously." (*Also see* 18 *Pick.* 115.) The exercise of the right of domain, which the law protects, and in respect to which it applies the rule of *damnum absque injuria* to any resulting injury to others, must be a legitimate use or appropriation of the property in a reasonable and proper manner, according as such property is usually applied, and without any negligence, unskillfulness or malice. If this acti n is sustainable, it must

be upon principles which deprive the defendants of the benefit of this rule in respect to the rights of domain. The cases cited by the plaintiffs' counsel in support of this demurrer and for the support of the action, it seems to me, are not precisely applicable. They are cases between riparian owners interested in the common use and enjoyment of the water of a stream running through or adjacent to their respective lands. The difficulty in the application of these cases, cited by the plaintiffs' counsel, to the present case is, that the defendants, in the sense of these cases, is not a riparian proprietor on the Owasco river. In this case the defendants not only do not own the land upon the shore of the river, but do not make any use of the water of the river. The injury of which the plaintiffs complain is not caused by any direct agency of the defendants, by surface water cast upon or flowing from their land, or "from any neglect, design or intent on the part of the defendants to corrupt the waters of said river, to the injury of the plaintiffs," as stated in their answer.

The answer states, "that the ground where the works of the defendants are situated have been, ever since the defendants' occupied said premises, and yet is, very incompact and pervious, and has been during said period, and yet is, percolated by the water of the said Owasco river, against the wishes or the interests of the said defendants, and without their procurement or agency; and if any offensive substances have flowed from the defendants' works or lot, it has only been by reason of the percolation of the waters of the said Owasco river through the soil or grounds adjacent to the said river into the soil and grounds occupied by the defendants' gas light works, and the reflux or return of said water unto said river from the said grounds." The defendants are in the lawful occupation of their lot, pursuing a legitimate business, without doing any intentional injury to the plaintiffs, and yet from such occupation, and the prosecution of such business on said lot and premises, an injury does result to the plaintiffs. It is a case where the business of the plaintiffs and the business of the defendants, at their respective locations, and without fault on

either side, as now conducted, cannot go on together without loss and injury to the plaintiffs. The case, too, is unaffected by any question of grant, prescription or prior occupation on the part of the plaintiffs. If the action can be sustained, therefore, it must be upon the sole ground that the use of the premises of the defendants for a gas works is relatively unreasonable and injurious to the plaintiffs, to such an extent or degree as necessarily to create or become a *private nuisance. At this point* the rule above stated by Judges Bronson and Gardiner in respect to the private use of property terminates, and the principle of the maxim *sic utere tuo, &c.* applies. Blackstone defines a private nuisance to be any thing done to the hurt or annoyance of the lands, tenements or hereditaments of another. (3 *Black.* 215.) Blackstone says, also, "If one erects a smelting house for lead, so near the land of another, that the vapor and smoke kill his corn and grain, and damages his cattle therein, they are held to be a nuisance," (*Cro. Car.* 570;) and by consequence it follows, that if one does any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find another place to do that act, where it will be less offensive; also, to corrupt or poison a water course by erecting a dye house or lime kiln, or in short, to do any act in the stream that in consequence "must necessarily tend to the prejudice of one's neighbor."

The act of the defendants in this case, in manufacturing gas upon the lot contiguous to the shore, "necessarily tends to the prejudice of the plaintiff," and is hence in conflict with the maxim *sic utere tuo, &c.* The answer admits this consequence, and claims exemption from damages and liability, on the ground that the water percolates through the soil without their fault, "intermixed or flooded with resinous, tarry or oily substances, as may have escaped from said works into the ground by accident, or in the ordinary course" of business. The counsel for the defendants insisted that the law applicable to the surface flow of water does not apply to water percolating in or through the soil, and cites *Beach* v *Driscoll,* (20 *Conn. R.*

542.) That was a case where one man had dug a reservoir on his lot, by excavating the ground four feet below the surface, into which the water came by percolation through the earth, and there stood in sufficient quantity for the use of his cattle. At a short distance he made another excavation or well, in which the water stood somewhat higher, from which, by a syphon, he brought the water to a cistern, from which he used it. The defendant did the same thing on his land adjoining, for the same purpose, which caused the water to fall in the plaintiff's reservoir, so that it did not supply the cistern; *held* that no action lay; and *Greenleaf* v. *Francis* (18 *Pick.* 117) was cited as a case like it. That was a case where the defendant dug a well on his own land, in consequence of which the water was diminished in the plaintiff's well. In both cases it was held that the law recognizes no title to water in the earth, separate from the soil. This is the extent of those cases. (*See also* 12 *Mees. & Welsby*, 324; 5 *Taunt.* 99.) The case of *Norton* v. *Scholefield*, (9 *Mees. & Welsby*, 665,) is the most analogous to the present case of any one I have seen. In that case the declaration stated that the plaintiff had a certain well and pump, and that the defendant was possessed of adjoining premises, and that he, intending to injure the plaintiff, erected a cess-pool so near the well and pump that the water was contaminated and rendered useless, by the oozing out of the soil and filth from the cess-pool. The case was disposed of upon a question of pleading, which assumed that the erection of the cess-pool was a nuisance. In *Tyler* v. *Wilkinson* (4 *Mason's R.* 400,) Judge Story defines the rights of riparian owners as follows: "*Prima facie* every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle or thread of the stream, or as it is commonly expressed, *usque filum aquæ*. In virtue of this ownership, he has the right to the use of the water flowing over it in its natural current, without diminution or abstraction, but strictly speaking he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the

water to the prejudice of another." If one propriet r may not make any use of the water to the prejudice of the proprietors below him, certainly a person with no rights in respect to the water, or rights inferior to those of a riparian proprietor, cannot be allowed to do so. In *Howell* v. *McCoy*, (3 *Rawle*, 250,) it is said that "a person has a right to so much of the water of a stream running across his land as is needful and proper for the supply of his tan yard and mill, and is bound to return the water so diverted, and not necessarily used and consumed in his business, without unnecessary waste or diminution, into the natural channel below, and that he is bound to return it *without polluting or poisoning it by admixture with unwholesome substances, to the injury of the owner below.*" This is upon the principle that every person entitled to the use of the water of a stream is entitled to receive it pure and uncontaminated. Like the air, it is common to all, and all who have occasion and a right to use it in any particular place, are entitled to receive it pure for use, as they have a right to require that the atmosphere they breathe shall be pure and free from artificial and noxious vapors. The maxim of the law is "*aqua currit et debet currere ut currere solebat;*" to which should be added—if it be unlawful to add to, or coin a new maxim in *latin*—the words, "*pure and uncorruptible.*"

It can make no difference with the principle, by whom the waters are corrupted. No one has the right to do so in respect to the waters of fresh water streams, so essential as they are to the health and comfort of man and beast, so indispensable to life, and for domestic, agricultural and manufacturing purposes. Any person interested in the use and enjoyment of the water of a running stream must be entitled to maintain an action for any special injury he may sustain from the corruption of the water by any other person, directly or indirectly, whatever may be the cause, pretense or the occasion. This rule is essential to a proper regard for the public welfare and to the preservation of the public health, and to the due and complete enjoyment of private rights.

I think, also, that gas works are to be placed in the class of

erections which are not within the ordinary and usual purposes to which real estate is applied; and that whenever they create a special injury they are to be regarded as a private nuisance, for which an action will lie in respect to the special injury, like a swine stye, (9 *Rep.* 59,) a lime kiln, (2 *Black.* 141,) a dye house, (*Hutt.* 136,) a tallow chandler, a furnace, (*Cro. Car.* 570,) a brewhouse, (*R. Pal.* 139, *Hutt.* 136,) a smelting house, (1 *Roll.* 89,) a smith forge, (*Lut.* 70,) a livery stable, (*Coke* v. *Bergen*, 2 *Georgia R.* 425,) or a tannery, (17 *Barb.* 654.)

In this case the defendants could probably obviate all the damages complained of, by draining off the water of the Owasco creek from their lot. This I think they are bound to do, if they continue their works on their present lot. In the case of *Stonehewer* v. *Farrar*, (6 *Adol. & Ellis, N. S.*, 51 *Eng. Com. Law R.* 728,) which was an action for polluting water, it was held by one arbitrator, to whom the case was referred, that the defendants should take all *proper and reasonable precaution* to prevent the water from becoming unfit for the plaintiff's use, and should use a process of filtering mentioned in the answer, to purify it, before returning it to the stream. If proper precaution in this case were taken to keep the water from percolating into or through the soil of the defendants' lot, the injury complained of in this suit would be obviated. The defendants are bound to do this if they would continue the works where they are at present, within the maxim, *sic utere tuo ut alienum non lædas.*

The judgment of the special term should be affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

PHELPS *vs.* BOSTWICK.

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Contracts must always be construed in reference to the subject matter to which they relate, and in the light of the contemporaneous facts and circumstances. Evidence of the extrinsic circumstances existing at the time is therefore always admissible, not to contradict the written agreement, but to aid in its interpretation.

A bailee or depositary is not liable to an action until demand and refusal. Therefore, where money has been left with another in naked deposit for the benefit of the owner, the latter cannot maintain an action to recover it, until a demand has been made upon the depositary, to restore it, and he has refused so to do.

APPEAL by the defendant, from a judgment entered at a special term. The complaint alleged, that on or about the 29th day of June, 1854, the defendant at his request had, and received of and from the plaintiff, to and for the use of the plaintiff, the sum of two hundred dollars in money; that afterwards, and on or about the 1st day of July, 1854, and on divers days and times since that day and before the day of the commencement of this action, the plaintiff demanded and requested of the defendant that he, the defendant, pay the said money over to him, the plaintiff; and that the defendant then promised to pay said sum over to said plaintiff, but has hitherto failed and neglected so to do, and was indebted to the plaintiff therefor. Whereupon the plaintiff demanded judgment against the defendant for two hundred dollars and interest thereon from the 1st day of July, 1854, besides costs.

The defendant, by his answer, denied the allegations in the complaint. The action was tried at the Steuben circuit, in May, 1855, before Justice JOHNSON, and a jury.

Seymour F. Denton being sworn on the part of the plaintiff, testified: "I live in Corning. I know the parties. I am teller of the Bank of Corning. I received some money from plaintiff for defendant, June 29th, 1854. I was agent for the defendant at that time to receive money for him. The paper produced is the receipt I gave for the money at the time." The counsel for the plaintiffs here offered and read in evidence the receipt spoken of by said witness, in the words and figures fol

lowing: "Rec'd, Corning, 29th June, 1854, of John C. Phelps, two hundred dollars, which is to be indorsed on contract No. 454, given by Corning & Fellows to Dexter Davis for the south halves of lots 9 & 10, in Block 48 in the village of Corning, whenever said contract is presented to me by said Phelps, duly assigned to him. for H. W. Bostwick,

S. F. Denton."

The witness then continued: "This money was passed to defendant's account in the bank, but he has never drawn it out." The plaintiff here offered to show that at the time of payment of the money and giving the receipt, the plaintiff said he did not know as he could get the contract, and the defendant promised if he could not, to repay the money. The counsel for the defendant objected to the evidence, on the ground that the receipt was in the nature of a contract in writing, and could not be changed or contradicted by parol. The court sustained the objection and excluded the evidence. The witness further stated: "The plaintiff afterwards requested me to ask the defendant to return the money—don't know when. It was soon after its receipt, say a month. I spoke to Hiram about it several times. I presume I have spoken to the defendant about it. I have talked with him about it several times. I talked with the defendant about the plaintiff's wanting to buy the original contract from the defendant, as he could not get the Davis contract. I don't know as I ever asked the defendant for it for the plaintiff. The plaintiff asked me for the money several times. I did not pay it back."

Hiram W. Bostwick 2d, a witness for the plaintiff, testified: "I am clerk in the Bank of Corning, and have been for some time. I heard a part of Denton's testimony. I recollect the fact of the plaintiff's handing in the $200 spoken of. I recollect of his coming in several times and asking if we had directions to pay it back to him. The plaintiff requested me to ask the defendant for the money. I think I spoke to the defendant about it. I don't know when; a month or two after the money was left, perhaps. The defendant never told me to tell the plaintiff that he could not have the contract. He told me

to tell the plaintiff that, with his permission, he would indorse it on one of H. G. Phelps' contracts which he, the defendant, held. I told the plaintiff of it, and he said he guessed his father was old enough to take care of himself. This was about the time above referred to." Horace G. Phelps, a witness for the plaintiff, testified: "Plaintiff is my son. I had a conversation with the defendant about this money, in the early part of last fall. He spoke to me first; said he had some money of John's, and John wanted it. And the defendant asked me if I would not turn it on my Jackson contract; said it was $200. He said it was hard times, and he wanted the pay on my contract. I told him I had nothing to do with that money. The defendant said nothing about this money's having been paid in by the plaintiff on the Dexter Davis contract. He said nothing about that contract, that I can recollect." The plaintiff here rested his case, and the defendant's counsel moved for a nonsuit, on the ground that no cause of action was made out. (1.) The money was paid voluntarily, to be applied in a certain way, and with a full knowledge of the circumstance. (2.) The money was paid in pursuance of a contract between the plaintiff and defendant, and there was no proof of any breach on the part of the defendant. (3.) The evidence did not establish the cause of action set forth in the complaint. (4.) There was no proof of any demand or request to pay the money. (5.) There was no proof of any promise to repay the money to the plaintiff, or any consideration for such promise. The court denied the motion; to which decision the counsel for the defendant excepted. The defendant's counsel then recalled as a witness, Seymour F. Denton, who testified: "The Dexter Davis contract, referred to in the receipt, was a part of the property of what is called the Corning Company, of which the defendant was one. They divided their property and this contract fell to him, and he has controled it ever since. At the time this money was paid, the defendant claimed to own that contract. The defendant was not present at the time the money was paid." The witness being cross-examined, the counsel for the plaintiff offered to show that the plaintiff never procured the said Dexter Davis

contract, or an assignment thereof. The defendant objected to the evidence, upon the ground that it was immaterial and irrelevant. The court overruled the objection, and admitted the evidence; to which the defendant's counsel excepted. Defendant's counsel then admitted, saving his exception as above, that the plaintiff never did procure the Dexter Davis contract, or an assignment thereof. The witness further stated: "The plaintiff wanted to get Bostwick's interest in the contracts, as he told me. I told the defendant of it. He said he would get advice, and if he could do it legally he would do it. I think I heard the defendant say afterwards that he had no objection to doing it. This was a few months after the money was paid. I think I heard the defendant say that he was willing to apply the money on old Phelps' contract." The defendant here rested; and the court charged the jury, that the payment of the $200 by the plaintiff, and the taking the receipt read in evidence, was a special deposit of money to apply in case the plaintiff should get the contract mentioned, and which the plaintiff never got, and was under no obligation to get, and that the plaintiff was entitled to recover the money with interest from the time of the demand of the money, and directed the jury to find a verdict accordingly; to which charge, and each particular part and direction thereof, the defendant's counsel excepted. And the jury, in pursuance of such directions, found a verdict for the plaintiff for $210.52.

George B. Bradley, for the plaintiff.

G. T. Spencer, for the defendant.

By the Court, E. Darwin Smith, J. Whether the defend ant was a mere depositary of the $200 specified in his receipt, or had an interest in the money, was a question of fact upon the true construction of the receipt, in view of the extrinsic circumstances existing at the time it was given. Such facts are always admissible in evidence, not to contradict the instrument, but to aid in its interpretation. Contracts must

always be construed in reference to the subject matter to which they relate, and in the light of the contemporaneous facts and circumstances. The facts in evidence in this case, I think, would have warranted the jury in finding that the $200 was left with the defendant in naked deposit for the plaintiff's own benefit and use. But in this aspect of the case, which was the view taken by the judge on the trial, the plaintiff clearly was not entitled to recover as the case stood when the motion was made for the nonsuit, or afterwards. The defendant was not liable to an action for this money until a distinct demand had been made upon him personally to restore it to the plaintiff, and he had refused so to do. Bostwick does not appear to have asserted any title to the money, or to have distinctly refused at any time to pay it to the plaintiff. He asked the plaintiff's father if he, the plaintiff, would not turn the amount on his (the father's) Jackson contract. Here was no assertion of title to the money or refusal to pay it over, and it appears that the money remained in his hands, not used. A bailee or depositary is not liable to an action until demand and refusal. (*Edwards on Bailments*, 85, 87. *Brown* v. *Cook*, 9 *John.* 361. *Beardslee* v. *Richardson*, 11 *Wend.* 25.) The plaintiff should have been nonsuited, or the question in respect to demand and refusal should have been submitted to the jury.

New trial ordered; costs to abide event.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

KETCHUM *vs.* CLARK and others.

22 319
30h 530
44h 570

The reference to a referee to take and state an account between the parties, in an action for the dissolution of a joint stock company, and for an accounting among the associates, under the 2d subdivision of sec. 271 of the code, is the reference of the former courts of equity, such as was always made to a master in cases of accounting. And the practice of the court of chancery in respect to references of that nature, is still in force in regard to proceedings before referees.

Hence, where no objections are made before a referee, as to the mode of proceeding, and no exceptions are taken to his report, both parties are concluded by the report, and neither is entitled to raise any question in respect to the details of the account, on the hearing of the cause upon the referee's report and the proofs.

THIS was an action for the dissolution of a joint stock company and for an accounting among the associates. After issue it was referred to a referee to take and state an account between the parties and report the same, with the proof, to the court. Upon the coming in of the referee's report the cause was brought to a hearing on such report and the proofs accompanying the same, and a decree was made at special term dissolving the association and confirming the report of the referee in regard to the accounts, with a few alterations and corrections thereof. From so much of the decree as declared a balance due from Alva Clark to the association, of $734.48, Clark appealed.

E. Van Buren, for the appellant.

D. B. Prosser, for the respondent.

By the Court, E. DARWIN SMITH, J. The reference in this case to take and state an account between the parties was made under the second subdivision of section 271 of the code. The reference, under this subdivision, is the reference of the old courts of equity, such as was always made to a master in cases of accounting. The practice in chancery in such cases was for the master to prepare a draft of his report and

deliver it to such parties as desired it, and for the parties then to come in and file objections to such draft, and after argument thereupon the master made his final report. To this report either party who had filed objections could take exceptions based upon such objections. (*See old Chancery Rules*, 109, 110; 1 *Barb. Ch. Prac.* 547.) These exceptions could be brought on before the court for argument, and nothing else in the accounts came up for review or examination. The report of the master was final and conclusive upon all parties, in respect to all such matters, after the expiration of the order *nisi*. That practice, so far as relates to references like the one in this case, is still in force in respect to proceedings before referees. Section 469 of the code, and the present rule of this court, 89, expressly retains all the customary practice in chancery, as it had heretofore existed in the court of chancery, in cases not provided for in some statute or other rule. No objection having been taken in this case before the referee, and no exceptions taken to his report, both parties are concluded by it, and neither is entitled to raise any question in respect to the details of the account, on the hearing of the cause. In this view of the rule applicable to such cases there is nothing before the court for review properly brought up on this appeal. But as this objection was not raised at the hearing at special term, and the judge did consider and carefully pass upon the whole case, the objection may possibly be deemed waived. In this view I have looked into the case, and it seems to me that complete justice has been done between these parties by the referee and the court at special term, with one exception. The appellant is charged in his account, by the referee, with the sum of $450 as received of Millbanks. This sum, it clearly appears, was received in fact by the firm of Clark, Ketchum & Sharp, of which the appellant A. Clark was a member. The amount should not, therefore, have been carried into the account of the appellant Alva Clark, but the $450 having been charged to him it should have been credited back. Three hundred dollars of this amount is credited back, leaving him charged, by the mistake, with the sum of $150. The

credit on his account should have been $450, instead of $300. The decree should be amended, so as to reduce the amount of the indebtedness of the said Alva Clark from $737.43 to $587.43, as of the date of the charge against him, with interest, and in all other respects should be affirmed, with the costs of the appeal, to be paid out of the fund in the hands of the receiver.

Decree modified. Costs to be paid out of the fund.

[MONROE GENERAL TERM, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

WOLCOTT *vs.* MEECH.

Where it was alleged in the complaint that the work and labor for which the action was brought was performed by Jones Wolcott, and the testimony showed that his real name was Edwin Jones Wolcott; *Held*, that this was an immaterial variance, and was properly disregarded by the referee.

APPEAL by the defendant from a judgment entered at a special term, upon the report of a referee. The action was brought by the plaintiff, John Wolcott, as assignee of "Jones Wolcott," to recover for work and labor performed by the latter for the defendant, in running a canal boat for him, during the season of 1848. The bill of particulars furnished by the plaintiff was for the "labor and services of *E. Jones Wolcott* in running canal boat for defendant for 7 months and 15 days, at $120 per month." The referee reported in favor of the plaintiff, for the amount claimed.

George B. Bradley, for the plaintiff.

Harris & Courtney, for the defendant.

By the Court, E. DARWIN SMITH, J. In the complaint it is claimed that the work and labor for which this action was brought was performed by Jones Wolcott. The testimony in the case shows that his real name was Edwin Jones Wolcott.

It was objected when the witness was called, and on the motion for a nonsuit, that this was a fatal variance, and that the contract set out in the complaint was not sustained by the proof. The referee disregarded the variance, and I think very properly. Among the best, if not the best provision in the code, is section 169, which is as follows: "No variance between the allegations in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Immaterial variances are to be disregarded on the trial, or the court may then amend, or whenever the question is presented. (*Secs.* 170, 173 *and* 176.) These are most beneficent provisions, and should be liberally construed and carried out. They were designed to correct a great evil and wrong in the old system, the turning of a party out of court, as very frequently happened, upon slight and non-essential mistakes in pleading, or variances between the pleadings and the proof. The defendant in this case could not have been misled by the mistake in the name of the witness; for, in the bill of particulars given in the cause, the labor and services are stated to have been rendered by E. Jones Wolcott, and there is no pretense in the case of any surprise on this point. On the merits there was conflicting evidence. The witness, Jones Wolcott, and the defendant, contradict each other in many points, positively. But this was a question for the referee, and we should not disturb his finding on such a point, more than we would the finding of a jury. But I think he decided it right. There was considerable corroborative evidence to sustain Wolcott. He had, confessedly, worked for the line in which the defendant was a large proprietor, and he had not been paid. He states many facts and particulars which must be true, and which tend to confirm his testimony; while the testimony of the defendant is chiefly in the *non mi ricordo* vein. I think substantial justice has been done by the referee, and a new trial should be denied.

Judgment affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

22 323
15h 358

The Clyde and Rose Plank Road Company *vs.* Parker.

Where an action was originally commenced in a justice's court, and the defendant put in a plea of title there, and gave the undertaking required by sec. 56 of the code; whereupon the action before the justice was discontinued, and a new action for the same cause was commenced in the county court, by a summons and complaint in the usual form, and the defendant appeared and put in an answer denying the material matters stated in the complaint; *Held*, that the appearance of the defendant and putting in an answer by him without objecting that the jurisdiction of the county court did not appear from the summons and complaint, was to be deemed a waiver of that objection, and an admission that the case was within the jurisdiction of the court.

Held also, that the rule that the jurisdiction of an inferior court must appear upon the record, does not necessarily require that it be set out in the complaint and summons in such a case.

If the plaintiff, on recovering at the circuit, in an action thus commenced, makes up a judgment roll, containing all the papers and proceedings from the commencement of the suit before the justice to the final judgment in the county court, as he is entitled to do, under the 281st section of the code, the record will show the jurisdiction of the county court, upon its face.

Hence, a summons and complaint in the ordinary form, without any recitals or averments conferring or showing jurisdiction, are a sufficient compliance with the statute, and the jurisdictional facts *aliunde* can properly be proved on the trial, or presented to the court with, or as a part of, the pleadings, like an offer under sec. 368 of the code.

Although consent cannot confer jurisdiction, yet where the court has jurisdiction of the subject matter, consent will dispense with recitals or statements in the pleadings, in matters of mere form.

APPEAL from an order of the special term granting a new trial. See 12 *Howard's Pr. Rep.* 371, where the facts are fully stated.

C. D. Lawton, for the plaintiffs.

J. Welling, for the defendant.

By the Court, E. Darwin Smith, J. The county court, as organized under the constitution of 1846, is confessedly a court of special and limited jurisdiction. (*Frees* v. *Ford*, 2 *Selden*, 176. *Kundolf* v. *Thalheimer*, 2 *Kernan*, 593.) The jurisdiction of such courts must always appear upon the record.

(*Idem.* *Werner* v. *Bank of North America*, 4 *Dallas*, 8. *Bloom* v. *Burdick*, 1 *Hill*, 139. 17 *Wend.* 483. 21 *id.* 40.) The rule thus stated has relation chiefly to the record of the inferior court when brought before a superior court for review, or when questioned in some collateral proceeding. The question of jurisdiction may always be raised in the inferior court itself, and whenever and wherever elsewhere its judgment is sought to be enforced. But in this case there is no judgment, and no final record of the proceedings of the county court has been made; and the case in this court is in the precise shape, and is to be considered and decided in respect to the question of jurisdiction, as though it were before the county court in fact, and we were sitting for its decision in the county court. The learned judge who tried this cause at the circuit treated it there precisely as he would have done in this court upon writ of error or appeal. He applied the rule that the jurisdiction of all inferior courts must appear upon the record; holding that the pleadings must show the jurisdiction upon their face, and that the omission in that particular could not be supplied or amended. It seems to me that the learned judge was mistaken in this view of the case, and in several of his rulings relating to this point of jurisdiction. The counsel for the plaintiff stated, in his opening, that the action was originally commenced in a justice's court; that the defendants put in a plea of title before the justice, and gave the undertaking required by section 56 of the code. That thereupon the action was discontinued before the justice, and this action, for the same cause of action, was in due time commenced in the county court, pursuant to the statute. From this statement it clearly appeared that the cause of action was one of which the county court had jurisdiction, both of the person and the subject matter. The defendant had appeared in the action and had put in an answer denying the material matters stated in the complaint. As the subject matter of the action was or might be within the jurisdiction of the county court, it seems to me that the appearance of the defendant, and answering without objection as to the question of jurisdiction, should be deemed, in that stage of

the suit, a waiver of the point that the jurisdiction should appear in the summons and complaint, and an admission that the case was within the jurisdiction of the court. Consent, of course, could not confer jurisdiction; but where the court has jurisdiction of the subject matter, consent could dispense with recitals or statements in the pleadings in matters of mere form. This was a case confessedly of jurisdiction in fact, and the only difficulty at the circuit was one of mere form. For the purpose of the trial, I think that the question of form should have been deemed waived, or it should be held that after issue such a question should not be entertained at the trial. But the rule that the jurisdiction of an inferior court must appear upon the record, does not necessarily require that it be set out in the complaint and summons in a case like this. This suit, for the purpose of jurisdiction, should be deemed to have been commenced in the justice's court. The record of the case, when made up, should contain the preliminary proceedings conferring jurisdiction upon the county court. This would be proper at all times, and necessary unless the summons and complaint contained recitals of those facts. The plaintiff had the right to file with the clerk of the county the summons of the justice, the pleadings before him, and the defendants' undertaking, and have them compose part of the judgment roll. They were part of the papers "*necessarily affecting the judgment.*" (*See* § 281 *of the Code.*) If the plaintiff had recovered at the trial, and had made up a judgment roll containing all the papers and proceedings from the commencement of the suit before the justice to the final judgment in the county court, as he was entitled to do under the above mentioned section (281) of the code, no court of review could say that the record did not show the jurisdiction of the county court upon its face. If this is so, it was not essential that the pleading should contain recitals or averments conferring or showing jurisdiction. The action is to be commenced by "summons and complaint in an action in the county court for the same cause of action in which the plaintiff declared before the justice." (*Code*, §§ 56, 60.) "And the *answer of*

the defendant shall set up the same defense only which he made before the justice." (*Idem.*) The sections of the code relating to this proceeding in the justice's court and county court, (*see* §§ 55 *to* 62,) all treat the action in the county court as a virtual continuation of the suit in the justice's court. The action in the county court is for the *same cause of action*, and the pleadings are to be substantially the same, (19 *Wend.* 123,) only as necessarily varied to conform to the style and practice of the court. (*McNamara* v. *Biteley*, 4 *Howard*, 44. 1 *Code Rep. N. S.* 27. 5 *Howard*, 424. 6 *id* 320. 7 *id.* 404.) In this view of the case the summons and complaint in this action complied with the statute, and the jurisdictional facts *aliunde* could properly be proved on the trial or presented to the court with, or as part of, the pleadings, like an offer under section 368 of the code. The point that the legislature could not confer jurisdiction of such cases upon the county court, is not well taken. This authority is expressly given to the legislature in section 14 of the new constitution, article 6. I fully concur with my brother WELLES in his views upon the whole case, and think with him that a new trial should be had.

Judgment of special term affirmed, and new trial ordered.

[MONROE GENERAL TERM, September 1 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

SPENCER *vs.* BABCOCK.

The assignor of the demand on which an action is brought, is a competent witness for the plaintiff.

Parol evidence is always admissible to apply a written contract to the facts, or to show the extrinsic facts to which the contract relates, and its practical execution in reference to such facts.

In an action by S. as the assignee of a demand held by A. against B., proof by the defendant that he and A. had been partners in trade, and that A. was indebted to B. on an unadjusted account, to a large amount, arising out of their partnership dealings, and that the liability of the defendant for which the suit was brought, was connected with the partnership transactions, is inadmissible in support of a counter-claim set up in the answer.

Spencer *v.* Babcock.

A counter-claim to be valid, under the code, must be a claim against the plaintiff on the record. The right to set up a counter-claim, against the assignee, after the assignment of a thing in action, is not reserved or given in any part of the code.

Where a counter-claim, set up in an answer, was embraced in five different specifications, numbered as five separate defenses, neither of which, alone, was a defense; *Held*, that the counter-claim was not properly stated.

Each defense or counter-claim should be a complete single defense, of itself, without reference to others.

A defense cannot be made out, in pleading, by connecting two or more separate defenses together, any more than it could formerly, by connecting together wo or more special pleas, each insufficient of itself.

APPEAL by the defendant from a judgment entered upon the report of a referee. The complaint alleged, that on or about the first day of April, 1849, the defendant, for the purpose of procuring a credit for one Marcus M. Wheelock in the purchase of goods and merchandise of one William J. Arnold, and in consideration of such credit to be given to the said Wheelock by said Arnold, made, executed and delivered to said Arnold, as security for the payment of such purchase of goods and merchandise, as he the said Wheelock should make of the said Arnold, a guaranty or agreement in writing, in the words and figures following, to wit: "In consideration of the sum of one dollar to me in hand paid, I do hereby agree to pay or cause to be paid to William J. Arnold, his heirs or his assigns, such sums and amounts as Marcus M. Wheelock shall trade or cause to be traded at the store of said Arnold from the date hereof, until I may forbid more goods being delivered upon the conditions of this consideration. The amount so accruing may be applied on a certain contract between Ralph Babcock and William J. Arnold for lot No. 4, in block 65, in the village of Corning; said article bearing date September 23, 1844, or in payment to Babcock & Arnold, by W. J. Arnold, through the undersigned, for stock of goods, as described in the annexed contract.

(Signed,) RALPH BABCOCK.

Dated Corning, April 1st, 1849."

The plaintiff further alleged, that after the said first day of April, 1849, and before the assignment hereinafter mentioned,

the said Marcus M. Wheelock traded, and caused to be traded, at the store of said Arnold, the sum of $4292.01, in which sum the said Wheelock was at the time of said assignment indebted to said Arnold for the goods and merchandise so traded, caused to be traded, sold and delivered by said Arnold to Wheelock. And that on the 21st day of August, 1850, the said William J. Arnold duly assigned to the plaintiff the said account and demand of $4292.01, together with the said agreement or guaranty of the said Babcock, for the benefit of certain creditors of the said Arnold, and that the said sum of $4292.01 has not been paid either by said Wheelock or said Babcock, except the sum of $1377.07, which has been applied on the said contract for said lot No. 4, nor has the same been applied on the contract in payment for stock of goods mentioned in said agreement, and that the sum of $2914.94, with interest on $865.97 from October 1st, 1849, and on $2048.97 from April 1st, 1850, remains due and unpaid. The plaintiff therefore demanded judgment against the defendant for the said sum of $2914.94, with interest on $865.97 from October 1st, 1849, and on $2048.97 from April 1st, 1850, besides costs.

The defendant, in his answer, 1. Admitted that he made, executed and delivered the agreement signed by him and set forth in the complaint, dated April 1st, 1849, but he denied that he made said agreement for the purpose of procuring credit for Marcus M. Wheelock in the purchase of goods and merchandise of William J. Arnold, or that the defendant made, executed and delivered said agreement to Arnold as security for the payment of such purchase of goods and merchandise as the said Wheelock should make of said Arnold. That said agreement was made and delivered for the purpose of creating an original claim against said defendant in favor of Arnold, for such goods and merchandise as Arnold should deliver to Wheelock upon the credit of the defendant, upon the strength and by reason of said agreement, without reference to, and independent of, the credit of said Wheelock. And that Arnold then being indebted to the defendant upon certain contracts hereinafter set forth, in sums due and to become due, and for goods and merchandise sold, and

money paid, laid out and expended, due and to become due, the said agreement was also made for the purpose of having the said Arnold's claim for such goods and merchandise as he should deliver to Wheelock by reason of said agreement, applied upon said claims of the defendant against Arnold. 2. And the answer further stated, that heretofore the plaintiff brought an action against the said Marcus M. Wheelock in the supreme court, to recover for the same goods and merchandise mentioned and referred to in the complaint in this action, and every part thereof, and to recover for which this action is brought. And that since the commencement of this action, and on the tenth day of November, 1853, the plaintiff recovered a judgment in said court against said Wheelock in that action for the same goods and merchandise that are mentioned and referred to in the complaint in this action, and every part thereof, and to recover for which this action is brought; that said recovery against said Wheelock was for or about the sum of $5463.12, including costs. And that by reason of said former recovery against said Wheelock, the plaintiff ought not to have or maintain this action. 3. The answer further alleged, that after the execution and delivery of said agreement, the defendant forbid and directed Arnold and his clerks not to deliver any goods and merchandise to Wheelock upon said agreement, except such as were to be used by Wheelock at or about a certain steam saw-mill in the town of Corning, in Steuben county, or in or about the business thereof, or by the hands of said Wheelock engaged in or about said mill, in conducting the business thereof. That said defendant had been informed and believed that Arnold and his clerks, after the defendant forbid and directed them as aforesaid, delivered goods and merchandise to said Wheelock, that were not to be used by Wheelock or his hands in, at or about said mill, or the business thereof, or by the hands engaged in the business thereof, and contrary and without reference to said directions of the defendant as aforesaid, and that some of the goods and merchandise mentioned and referred to in said complaint, and for which this action was brought, were so delivered by Arnold and his clerks to Wheelock, and without reference to

said directions of the defendant given as aforesaid, and which were not used in, at or about said mill, or by the hands engaged in and about the business thereof. 4. And the answer further alleged, that the defendant had not knowledge or information sufficient to form a belief, that after the first day of April, 1849, and before the pretended assignment to the plaintiff alleged in the complaint, Wheelock traded, and caused to be traded, at the store of Arnold, the sum of $4292.01, or that Wheelock, at the time of the alleged assignment, was indebted to Arnold in the sum aforesaid, or any other sum, for the goods and merchandise traded, caused to be traded, sold and delivered by said Arnold to said Wheelock, as alleged in the complaint. 5. The answer further stated, that the defendant had not knowledge or information sufficient to form a belief, that on the 21st day of August, 1850, or any other time, the said Arnold assigned to the plaintiff the alleged account and demand of $4292.01, or any other sum, together with the agreement of the defendant set forth in the complaint for the benefit of certain creditors of the said Arnold, or that the alleged sum had not been paid, except the sum of $1377.07, as alleged in said complaint. 6. And the answer further stated, that the contract for the sale of stock of goods referred to in, and annexed to, said agreement, was as follows: "Articles of agreement made this first day of the April, 1849, between Ralph Babcock and William J. Arnold, of the firm of Babcock & Arnold, at Corning, Steuben county, and state of New York, of the first part, and William J. Arnold of the place aforesaid, of the second part. The parties of the first part sell to the party of the second part their goods, wares and furniture in the store at Corning, as per invoice of this date, amounting to $995.85, deducting therefrom twenty-five per cent from the first cost of goods, making the net amount $746.89, and the parties of the first part do further sell to the party of the second part twenty bushels dried apples at 81⅓ cents per bushel, and nine barrels mess pork at $14.50 per barrel, making total amount of net sales $893.64, and the parties agree that said amount shall be paid in two equal payments of $446.82. The payments to be made at six and twelve months from this

date, interest allowed on last payment after six months, and on amount of pork and apples from this date. And the party of the second part does hereby agree to pay the parties of the first part the sum of $893.64, in two equal payments, the one in six and the other in twelve months from this date, as above specified.

Dated Corning, April 1st, 1849.

RALPH BABCOCK,
W. J. ARNOLD,
Firm of Babcock & Arnold."

That the sums to be paid by the terms of the contract last above mentioned and set forth had not been paid, and that at the time of the alleged assignment the said Arnold was indebted to the defendant therefor, and interest thereon. 7. The answer further alleged, that on the 15th day of June, 1849, the said William J. Arnold and the defendant executed an agreement in writing, under seal, as follows, to wit: "This agreement between W. J. Arnold and Ralph Babcock, made this 15th day of June, 1849, witnesses that it is mutually agreed by and between the said parties that all notes, bills and demands of whatever kind the same may be, now due or to become due, from any person or persons, to the firm of Babcock & Arnold, arising in the prosecution of their partnership business, shall be, and the same are hereby transferred to the said Babcock by the said Arnold, as entirely and completely as the said Arnold is able so to do. And the said Babcock is fully authorized and empowered by the said Arnold to receive payments, to sue for, and to do and perform every act in and about the said notes, bills and demands, necessary for the collection thereof in his own right and name, as fully as if the said notes, bills and demands had always been the property of the said Babcock. And the said Babcock agrees to take the said notes, bills and demands, as above provided, and to render a just and true account to the said Arnold, for the share of the said Arnold in the same. In witness whereof, we have hereunto set our hands and seals this 15th day of June, 1849. W. J. ARNOLD. [L. S.]
R. BABCOCK. [L. S.]

That at the time of the execution of said agreement set forth

in said complaint, there was due and unpaid, and still remains due and unpaid on the notes, bills and demands assigned by said Arnold to the defendant, by the terms of the agreement last above set forth, about the sum of three thousand dollars, which the defendant would also set off and recover in this action. 8. The answer further alleged, that previous to the first day of April, 1849, the said William J. Arnold and the defendant had been partners, doing business together under the partnership name, style and firm of Babcock & Arnold, and that on the said first day of April, 1849, said partnership and firm were dissolved. That at the time of the execution of the said agreement of the defendant set forth in the complaint, there was due from said Arnold to the defendant, on the contract between the defendant and said Arnold for lot No. 4, in block No. 65, referred to in said agreement set forth in the complaint, the sum or about the sum of $1356.85, and that the same has not been paid, which, with interest thereon from that time, would be set off and applied upon the plaintiff's claim in this action. 9. And the answer further showed, that at the time of the dissolution of the firm as aforesaid, Arnold was indebted to the firm of Babcock & Arnold, in or about the sum of $2000, for goods, wares and merchandise taken by and sold to him at his request, and for money before then had and received, lent and advanced, paid, laid out and expended at the request of said Arnold, which still remained due and unpaid, and which, together with interest thereon, the defendant would set off and recoup in this action. 10. The answer further stated, that the said firm was a mercantile one. That at the time of the alleged assignment to the plaintiff, the copartnership accounts and dealings of the said copartners were and still are unadjusted and unsettled, but that upon such dealings and settlement of such accounts, there was before, and at the time of the alleged assignment, and still is, a balance due from the said Arnold to the defendant of about the sum of six thousand dollars, over and above the just share and proportion of said Arnold, for money had and received, goods, wares and merchandise, taken by and sold and delivered to said Arnold by said firm, and for money before then paid, laid out and

expended by defendant, upon and in satisfaction of debts due from and owing by the said firm, and for money lent, advanced, paid, laid out and expended by defendant to, for and on account of said firm. And the defendant asked that the partnership dealings and accounts be stated and settled, and that so much of the amount due him thereon be set off and recouped against the demand of the plaintiff, to be established upon the trial, as should be sufficient to satisfy the same. 11. The answer further showed, that the said Arnold, at and before the alleged assignment to the plaintiff, was further indebted to the defendant, in the further sum of twenty dollars, for one cow, before then sold and delivered by defendant to said Arnold, at his request. And that all of the said sums above mentioned remained unpaid, and the defendant would set off and recoup so much thereof as should be sufficient to satisfy any demand of the plaintiff, to be established upon the trial.

The several matters alleged in the answer were put in issue by a reply.

The cause was tried before a referee. At the close of the plaintiff's testimony, the defendant's counsel moved that the plaintiff be nonsuited, on the grounds, 1. That the plaintiff had not made out a cause of action. 2. That the goods delivered, were not delivered upon the agreement made by the defendant, and dated April 1st, 1849; the goods having been delivered upon the credit of, and charged to, Marcus M. Wheelock, and not to the defendant. 3. That the plaintiff having recovered a judgment for the same goods against Marcus M. Wheelock, as appeared and was admitted by the pleadings, such recovery was a bar to a recovery against the defendant therefor; the said agreement of the defendant not being collateral to the liability of Wheelock. The referee denied the motion, and the defendant's counsel excepted to his decision. The defendant's counsel then offered to prove that, before and at the time of the execution and delivery of the assignment by Arnold to the plaintiff, there was an unadjusted and unsettled partnership dealing and account between said Arnold and the defendant, (who had been copartners;) that upon such dealing there was then and still

was a balance due from said Arnold to the defendant of $6000, for money had and received by said Arnold, and for goods sold and delivered to him by said firm of Babcock & Arnold, and for money before then paid, laid out and expended by the defendant upon and in satisfaction of debts due and owing by said firm to divers individuals, and for money lent, advanced, paid, laid out and expended by defendant to, for and on account of said firm, as set up and alleged in defense No. 10, in the answer of the defendant. And the defendant also offered to prove all the matters and things alleged in said defense No. 10, in said answer, as therein alleged. The plaintiff's counsel objected to the evidence thus offered in each of said propositions respectively. 1. Because a claim growing out of partnership relations before an account stated is not a subject of set-off, and because there was not enough in the answer to call for a partnership account to be stated and settled. 2. Because the counter-claim was not against the plaintiff in this suit. 3. Because, before a partnership account could be stated and settled, Arnold should be made a party. 4. Because the debt of Arnold to the firm of Babcock & Arnold could not be assigned to Babcock, so as to authorize Babcock to maintain an action against Arnold upon it.

Which objection was sustained by the referee, and the evidence rejected; to which decision the defendant's counsel excepted. The evidence here closed; and the referee made his report, whereby he found for the plaintiff for $3881.32.

G. T. Spencer, plaintiff in person.

George B. Bradley, for the defendant.

By the Court, E. Darwin Smith, J. The referee rightly disposed of the several questions presented during the progress of the trial, before and including the motion for a nonsuit. Arnold was a competent witness, and it was not error to allow him to state that the goods were delivered upon the agreement. Parol evidence is always admissible to apply the written contract to the facts, or to show the extrinsic facts to which the

contract relates, and its practical execution in reference to such facts.

The only point of any difficulty in the case arises upon the offer of the defendant's counsel, to show the matter of defense or counter-claim set up in their answer. This was overruled by the referee. The offer of the defendant's counsel was in effect to prove that Arnold and the defendant had been partners in trade, and that Arnold was indebted to the defendant in an unadjusted account to the amount of about $6000, arising out of their partnership dealings, and that the liability of the defendant, for which this suit was brought, was connected with the partnership transactions. This matter of counter-claim, if it was such, is not properly stated in the answer. It is embraced in five different specifications, numbered as five separate defenses, neither of which alone is a defense. Each defense or counter-claim should be a complete single defense of itself, without reference to others. (5 *Sand.* 210.) A defense cannot be made out in pleadings, by connecting two or more separate defenses together, more than it could formerly by connecting together two or more special pleas, each insufficient of itself. The matter set up in these five several defenses as numbered, if the action were in the name of Arnold, would, I think, constitute a good equitable counter-claim. The claim of the defendant is connected with the partnership transactions between Arnold & Babcock, and there is a strong equity that one claim should offset the other; and if Arnold had been brought before the court by cross-action, or were the plaintiff on the record, such application might be made. But the code is explicit that the counter-claim can only be a claim against the plaintiff. Section 150 is as follows: "The counter-claim mentioned in the last section must be one existing in favor of a defendant and *against a plaintiff*, between whom a several judgment might be had in the action." This applies only to the *plaintiff on the record* (*See Gleason* v. *Moen*, 2 *Duer*, 642.) Section 112 of the code, relating to assignments of choses in action, only relates to and protects set-offs or other defenses existing as against the assignor at the time of the transfer. The right to set up

counter-claim, after the assignment of a thing in action, is not reserved or given in any part of the code. For this reason the offer of the defendant was properly overruled by the referee, and a new trial must be denied.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

Syron *vs.* Blakeman.

Where gravel was given to the public, by the plaintiff, and was delivered to and applied by the defendant as overseer of highways, in repairing the road, *Held*, that no action would lie against the defendant for the value.

A permission by parol, from the owner of the gravel, in such a case, is sufficient to protect the defendant from liability; a parol license to enter upon land and remove a part of the soil, being a complete justification of acts done under it.

Where, in an action for gravel sold and delivered to the defendant, it was proved that in 1853 and 1854 the plaintiff and others, all acting under the direction of the defendant, went on land in the plaintiff's possession, and took gravel from the same, and put it on the road; that in 1853, before the gravel was drawn, the plaintiff told the defendant he could go there and get gravel to draw on the road; and it was inferrible from the evidence that the defendant was overseer of highways, and acting as such; *Held* that the license was to be construed as authorizing the taking of the gravel without compensation, and that such license was not limited as to time, but continued until 1854, or would be implied, under the circumstances; and that consequently the plaintiff was not entitled to recover.

APPEAL by the defendant, from a judgment of the Wayne county court, reversing the judgment of a justice. The opinion sufficiently states the facts.

C. D. Lawton, for the appellant.

J. Welling, for the respondent.

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By the Court, T. R. STRONG, J. The complaint in this case, was an account for gravel sold by the plaintiff to the defendant, and the answer denied the complaint. It was proved, on the trial, that in 1853 and 1854 the plaintiff and others, all acting under the direction of the defendant, went on land in possession of the plaintiff, and took gravel from it and put on the road; that in 1853, before the gravel was drawn, the plaintiff told the defendant he could go there and get gravel to draw on the road; that he could draw what had caved in on the sand. There was no proof that the defendant was overseer of highways, except that one witness testified the defendant warned him to work on the road, and the defendant's directing what was done. This is the substance of all the evidence given, and it was wholly insufficient to entitle the plaintiff to recover. It is fairly inferrible from the evidence, that the defendant was overseer of highways, and acting as such; the road was a public one; and that the defendant had no more interest in the taking and use of the gravel than any other member of the community. He had the express permission of the plaintiff to take the gravel, not in terms without compensation, but such is the just construction of it The permission given in 1853 was not limited as to time, and continued in 1854, there being no evidence of a revocation. But without evidence of such a permission, in words, as to 1854, it would be implied from what had taken place in the year previous, and the presence and participation of the plaintiff in the work, in the absence of proof of any claim to compensation. No ground, therefore, exists for implying a sale of the gravel; on the contrary, the idea of a sale is completely disproved. The gravel was given to the public, and delivered to and applied by the defendant as an agent of the public to their use. In respect to delivery, the plaintiff could not well have done more thar he did by aiding in taking the gravel away.

The validity of the permission, so far as it was necessary to protect the defendant from liability for what he did, is unquestionable. A parol license to enter upon land and remove part of the soil, is a complete justication of acts under it. (*Pierre-*

pont v. *Barnard*, 2 *Selden* 279.) Here the plaintiff assisted in what was done.

The claim of the plaintiff is entirely destitute of merits; and the judgment of the county court must be reversed, and that of the justice affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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Cook and others *vs.* Travis.

In an action of ejectment, it appeared that in 1818 the title to the premises in question was in Peter Young; who was the common source of title of the respective parties. In October of that year, S. S. Munn recovered a judgment against Young and A. Cutler, which was docketed on the 24th of October; and in November following, John Mowatt, jun. recovered a judgment against the same persons, which was docketed on the 12th of that month. Executions were issued on these judgments; and under that issued upon the Munn judgment, the premises were sold to H. D. Barto the latter part of December, 1819, or early in 1820. Under the one issued upon the Mowatt judgment, the premises were sold to W. Platt, about the same time. Peter Young was then in possession of the premises, and continued in possession until 1850, claiming title under a life lease from Jacob J. and John J. Young. No deed was executed to Barto, by the sheriff, until April 22, 1853. Barto conveyed to Jacob J. Young and John J. Young, by deed dated November 7, 1820, which was recorded the 17th of the same month. In the description of the premises in this deed, it was stated that they were purchased by Barto, at a sale by the sheriff, under the Munn judgment. John J. Young conveyed to Andrew J. Cutler and others, by deed bearing date May 22, 1847, proved June 27, 1849, and recorded the 8th of October thereafter. The defendant was in possession of the premises as tenant of Andrew J. Cutler. A deed was executed by the sheriff to Platt, on the sale to him, dated February 2, 1820, acknowledged the same day, and recorded the 26th of February, 1820. Platt conveyed the premises to J. S. Beebe, by deed dated February 21, 1820, and recorded April 2, 1828. Beebe conveyed to A. Cutler, by deed dated February 27, 1828, and acknowledged and recorded November 11, 1828. A. Cutler executed a mortgage of the premises to the N. Y. Life Insurance and Trust Co. dated November 29th, 1832, which was recorded on the 5th of December, 1832. This mortgage was foreclosed, and the premises were all sold under the judgment in the foreclosure suit, to the mortgagees, who took a deed from the sheriff

dated the 13th and recorded the 14th of February, 1852. The Trust Co. conveyed to E. Baker, by deed dated April 12th, 1852, acknowledged the 19th and recorded on the 31st of the same month; and the plaintiff deduced title from Baker.

Held, 1. That A. Cutler, at the time of the execution of the mortgage by him to the N. Y. Life Insurance and Trust Co., having a regular paper title to the premises, duly recorded, through the judgment of Mowatt against Peter Young, and the records not showing any deed from the sheriff on the sale to Barto, the mortgagees were, under the recording acts, entitled to a preference for the mortgage over the title under the Munn judgment; unless at the time of taking the mortgage, they had notice of that title.

2. That the record of the deed from Barto to Jacob J. and John J. Young, containing a recital of the sale under the judgment, was not such notice. And that there being no record of a conveyance to Barto, and no evidence of notice that he made any claim to the premises, they were not required to search for a conveyance by him, and were in no way affected by the record of such conveyance.

3. That Peter Young being the acknowledged owner of the premises, in fee, and his entire title having been sold and conveyed under the Mowatt judgment, the possession by him, thereafter, being of the same character as before, without any apparent change, the fair inference, and legal presumption, from his continued possession, was that he was in under Platt, the purchaser and grantee of the sheriff, and those coming under him.

4. That the mortgage lien must be preferred to the title of the grantees in the deed from Barto.

5. That there was no such adverse possession as would avoid any of the conveyances in the plaintiff's chain of title. That Peter Young, while in possession, was estopped by the sale and conveyance under the Mowatt judgment, and by the decree in the foreclosure suit, to which he was a party, from setting up a title in himself; and that Henry and A. J. Cutler going into possession under Peter Young, they were estopped, in like manner with him, from disputing the title sought to be enforced by the plaintiff.

6. That the mortgage having priority, notice to the mortgagees, of the hostile title, at the time of the sale under the decree in the foreclosure suit, or, subsequently, to any person claiming under that sale, could not affect their title under the mortgage. That the protection which the mortgagees might claim, could not be impaired by a subsequent notice; and that it extended to all persons claiming title through the mortgage, whether they had notice at the time of the purchase or not.

It is a general rule that the possession of land is notice to others of the possessor's title. But the rule is not universal. The notice is merely an inference; it may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title or claim.

The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation.

Cook *v.* Travis

THIS action was brought to recover possession of States 100 acres of lot 44, Ovid, commenced August 1, 1854. The complaint stated that Baker, being the owner of the premises, agreed with Daniel Tyler to exchange the Lodi farm for Tyler's farm in Hector; and on the 21st of February, 1853, they exchanged conveyances accordingly, for their respective farms; Baker covenanting to give and insure to Tyler possession of the Young farm, and deeds were recorded. Tyler was to pay $1400 on the exchange, of which he paid $800. That Baker and Murlin, who were partners in trade, becoming embarrassed, conveyed, March 25, 1853, all their property to Cook, Carson and Murlin, the plaintiffs, in trust, to pay creditors. That the defendant took possession of the Young farm and refused to give it up to Tyler, and Tyler therefore brought an action in the supreme court for relief, and to have the bargain of exchange rescinded, and the Tyler farm reconveyed by the assignees, and the supreme court gave judgment accordingly; and the assignees, under the order of the court, conveyed to Tyler the Hector farm, and Tyler conveyed the Peter Young farm to the assignees, who became seised. That the defendant entered upon the possession and withheld it. The defendant answered, 1st. A general denial. 2d. That Andrew J. Cutler was the owner of the Peter Young farm, and on the 24th May, 1854, leased to the defendant till 1st May, 1854, and the defendant received and held possession as his tenant. 3d. That the plaintiffs, and those under whom they held, had not been seised or possessed within 25 years. 4th. That A. J. Cutler, and those under whom he held, had held adversely for more than 25 years, and the deeds under which the plaintiffs claimed were therefore void. 5th. That Tyler, claiming title and possession, served notice upon Cutler under the act to determine conflicting claims, requiring Cutler to appear and assert his title, &c. That Cutler appeared and pleaded, December 7, 1853, that he had been in possession for three years, and that issue was still pending. The present action was tried before Judge WELLES at the Seneca circuit, September, 1855. On the trial the following facts were shown: November 9, 1818, John Mowatt, jun. obtained a judgment in Tompkins common pleas,

docketed the 12th, against Abraham Cutler and Peter Young, for $799 and costs, upon which an execution was issued to the sheriff of Tompkins, in which county these premises then were, tested May 27, 1819, returnable September 7, and received by the sheriff July 13, 1819, to collect $463.83 and interest. The sheriff, under this execution, sold the Young farm, which was purchased by William Platt, and the sheriff conveyed to him as purchaser, February 2, 1820, all the right and title of A. Cutler and Peter Young, in the usual form. This deed was duly acknowledged on the same day, and recorded February 26, 1820. William Platt conveyed to J. S. Beebe, February 21, 1820; deed was proved by A. Cutler, subscribing witness, before a commissioner, and recorded April 20, 1828, and Beebe conveyed to Abraham Cutler, February 27, 1828; deed recorded August 11, 1828. In August term, 1828, an ejectment suit was commenced in the name of James Jackson, upon the demise of Abraham Cutler, against John Stiles, Peter Young tenant, and judgment for the plaintiff entered and recorded, signed and filed February 20, 1829, upon which a writ of possession was issued to the sheriff of Seneca, returnable October 31, 1829, and returned by the sheriff, "served as required." Asgill Gibbs was the plaintiff's attorney in the ejectment suit, and was a witness on the trial, and testified that the suit was brought by him for Abraham Cutler, to recover the 44 Ovid 100 acres then occupied by Peter Young, and that he issued the writ of possession and delivered it to the deputy sheriff, with directions to deliver possession of the premises to Abraham Cutler. On the 29th of November, 1832, Abraham Cutler and Catherine his wife executed a bond and mortgage to the New York Life Insurance and Trust Company, the mortgage being for the premises in question, conditioned for the payment of $4000, payable December 1, 1842. The mortgage also covered and conveyed a farm of 150 acres in Hector. The mortgage contained a covenant from Abraham Cutler for the payment of the money with semi-annual interest, with the usual power of sale in case of non-payment, and also a proviso that if default should be made in the payment of the semi-annual interest for thirty days, the

mortgagees might foreclose, or enter a decree for the whole amount of principal and interest. This mortgage was recorded December 5, 1832. On the 31st of March, 1843, the New York Life Insurance and Trust Company filed a bill in chancery to foreclose this mortgage, against Abraham Cutler and wife, and making, among others, the heirs of Noadiah Shannon, the Seneca County Bank, John De Mott and Peter Young, parties defendants. Notice of *lis pendens* was filed in the Seneca county clerk's office, March 29, 1845. Abraham Cutler and wife did not appear or answer in that suit, and a decree in the usual form was taken against them *pro confesso*. The Seneca County Bank and Peter Young appeared and put in separate answers in the foreclosure suit. The separate answer of Peter Young set forth, in substance, that the execution of the bond and mortgage by Abraham Cutler and wife to the Trust Company was admitted as set forth. That the defendant Peter Young claimed an interest in the Lodi farm, (premises in question,) part of mortgaged premises. That he became the purchaser in 1798, and had a perfect title, and had been ever since in possession, and denied that Abraham Cutler had the title. That Peter Young became security for Abraham Cutler for goods purchased in New York, and among others, to John Mowatt, jun., of whom Cutler, in the fall of 1816, purchased goods on credit to the amount of about $400, for which Young became security. That Mowatt obtained judgment against Cutler and Young in 1818 or 1819, upon which execution was issued to the sheriff of Tompkins, and Young's farm advertised and sold, and bid off by William Platt, who took the sheriff's deed from N. Halsey. That in 1821 Platt, in consideration of having the Mowatt judgment paid, conveyed the premises to J. S. Beebe, who, about 1825, in consideration of the payment of the Mowatt judgment, and a judgment in favor of S. B. Munn, against Cutler and Young, in a case where Young had also become liable as security for Cutler, conveyed the Young farm and other property to Abraham Cutler and Peter Young. That when Cutler and wife mortgaged to the New York Life Insurance and Trust Company, he had no other

title than that derived from Beebe. That as advised by counsel, the judgment of Mowatt against Cutler and Young being upon a demand on which Young was only security, Cutler had no right to purchase for his own benefit, and held the title in trust for Young, of which the complainant had notice, and therefore acquired no lien. That at the time of giving the mortgage, Cutler owned a farm in Hector, also included in the mortgage, which was sufficient in value to pay the mortgage. That in 1837 Cutler and wife conveyed this farm to N. Shannon, whose heirs were made defendants, expressly subject to the payment of $2500 of the mortgage due the Trust Company, and he insists that the Hector farm should be first sold and the Peter Young farm released. This foreclosure suit was brought to a hearing upon pleadings and proof before L. H. Sandford, assistant vice chancellor, and a decree entered September 30, 1846, by which it was ordered that the Hector farm should be first sold to the amount of $2500, and the interest to accrue, and ⅔ of the costs, and the Peter Young farm should be next sold to the amount of $1500 and its arrear of interest and ⅓ of the costs, and in case of any deficiency of the Hector farm, the balance was made chargeable on the Peter Young farm, and for any final deficiency in both, Abraham Cutler was decreed to be personally liable. Peter Young was also made personally liable for the extra costs by reason of his defense. The decree was duly enrolled February 10, 1852.

This decree was affirmed by the supreme court at general term, on appeal, September term, 1849. The Peter Young farm was sold under this decree by the sheriff of Seneca, and bid off by the New York Life Insurance and Trust Company for $500, and a sheriff's deed given to the company February 13, 1852, and recorded February 14, 1852. The sheriff's report was filed and an order of the supreme court in equity entered, confirming report, March 6, 1852. The Trust Company sold and conveyed the Peter Young farm to Elijah Baker, April 12, 1852, and the deed was recorded April 21, 1852. Baker and wife conveyed to Daniel Tyler, February 21, 1853, for the consideration of $6360, with covenants of seisin and warranty, deed

recorded March 7, 1853. On the same day Tyler and wife conveyed to Baker the Tyler farm in Hector, for the consideration of $4900; deed recorded March 1, 1853. On the 24th of March, 1853, Baker and Murlin executed a deed of assignment to Cook, Carson and Daily, the plaintiffs, recorded the same day. This deed recited that Baker and Murlin were partners, (with others;) that they had purchased the interest of the other partners and assumed payment of the debts of the old firm, and were unable to pay their debts, and therefore conveyed all their real and personal estate, whether copartnership or individual property, to assignees, in trust to sell and pay their debts. Daniel Tyler afterwards brought his action in the nature of a bill in equity, in the supreme court, against Baker the assignee, and other parties, asking to have the exchange rescinded, and the money paid in exchange repaid, on the ground that Baker had failed to perform his covenants, and that Tyler could not get possession; and on the 13th of June, 1854, the supreme court gave judgment in Tyler's favor accordingly, declaring the exchange null and void, and the assignees were decreed to reconvey to Tyler his Hector farm, and that Tyler thereupon should reconvey to the assignees the Peter Young farm, and the assignees were to repay the money paid on the exchange. In pursuance of this decree the farms were re-exchanged, and Tyler and wife conveyed the Young farm to Cook, Carson and Daily, the assignees, June 15, 1854, by deed recorded July 29. The defendant was in possession at the commencement of this suit, under a lease from Andrew J. Cutler, commencing May 12, 1854, and ending April 1, 1855. On the 27th of June, 1845, Peter Young, for the consideration of $2000, as expressed in the deed, paid by the grantees, conveyed the Young farm, being the premises in question, to Catherine Cutler during her life, and after her death, to her eleven children and heirs, Catherine, Sarah M., Minerva, Martin and Clinton, Mary Jane, Eliza Ann, Henry D. B., Andrew J. and Julia Cutler, always excepting and reserving to Peter Young, grantor, the said premises, to hold and keep possession thereof during his natural life, for his use and benefit exclusively

This deed was recorded June 27, 1845. Henry D. B. Cutler, by quitclaim deed, on the 27th of January, 1849, conveyed to Andrew J. Cutler all the grantor's *undivided eleventh part* of the premises in question, describing it as the States hundred 44 Ovid, "which has been owned or been in the possession of Peter Young, and which Henry D. Barto purchased at sheriff's sale under an execution issued out of the supreme court, on a judgment in favor of Stephen B. Munn, against Peter Young and Abraham Cutler, and which Barto conveyed to John J. Young and Jacob Young, by deed of November 7, 1820, recorded," &c., and being the same land conveyed by John J. Young to Andrew J. Cutler and others, (naming the children and heirs of Catherine Cutler,) May 22, 1847. On the 20th of August, 1835, Peter Young and wife mortgaged the premises, being the farm now in possession of Peter Young and wife, to secure the payment of $1075 in bond of P. Young to John De Mott, recorded September 4th, 1835. This was the plaintiff's case as shown on the opening.

The defendant's counsel, on opening, stated that Peter Young, prior to 1818, was the owner of the premises; that S. B. Munn recovered a judgment against Young and Abraham Cutler, issued execution, and the premises were bid off at sheriff's sale by H. D Barto, and the sheriff gave, *or was to have given*, a deed; that Barto conveyed to John J. and Jacob Young, of New Jersey, who took possession under this deed, and continued in possession by *Peter Young, their tenant, who had a life lease*, till they sold to Andrew J. Cutler and the other Cutlers, May 22, 1847, and since then Andrew J. Cutler by himself, or tenants, had been in possession. That the defendant held under Andrew J. Cutler. The plaintiff's counsel objected to the evidence of the facts stated in opening, on the ground that the defendant and A. J. Cutler were estopped from denying Peter Young's title, or from setting up an adverse title. The evidence was admitted, subject to this objection. The defendant thereupon, under objection, proved the following facts: That S. B. Munn, October 24, 1818, recovered judgment, by confession on bond and warrant of attorney, against Abraham

Cutler and Peter Young, in the supreme court, for $2000 debt and costs, the specifications of indebtedness then required by statute being, in general, items for goods, &c., and therefore supposed to be defective. That an execution was issued to the sheriff of Tompkins, who levied on and sold the Peter Young farm, which was bid off by H. D. Barto, who was attorney for Munn, as his trustee, about February 20, 1820. Barto had taken the acknowledgment of the deed of the plaintiff to Platt on the 2d of February. Before the sale the attorney for Mowatt served an order for the stay of proceedings on the Munn judgment, with notice of motion to set it aside, on account of the defective specification. It was therefore concluded to buy in the Mowatt judgment, which was done by J. S. Beebe, as agent for Munn, and the motion and stay of proceedings being therefore waived, Barto went on with the sale under the Munn judgment, and Barto, as agent of Munn, bid in the premises at sheriff's sale, and Barto, without taking a deed from the sheriff, conveyed the premises to John and Jacob Young, on the 7th of November, 1820; deed recorded November 17. Barto never saw them, but delivered their deed to Van Horne of Ovid, who paid $600 consideration, as their agent. Barto, under the plaintiff's objections, testified that this conveyance was made by the consent of Beebe. Beebe who was called as a witness by the plaintiffs, testified that he never knew of any conveyance from Barto to John and Jacob Young, and never directed or authorized Barto to give any such deed. Barto testified that he never received a deed from the sheriff under the Munn judgment. The only deed executed by the sheriff under that judgment was after the commencement of this suit, when the sheriff, at the solicitation of Abraham Cutler, executed a deed prepared for him by Cutler's counsel, at their office. This deed bore date April 22, 1853, and when executed was delivered over directly to Abraham Cutler, Barto being present. The object in giving this deed was stated at the time to be to supply a defect in the title. At the time of the sale by the sheriff, Peter Young was in possession of the premises. This deed was objected to when offered in evidence, for the reasons stated by

the plaintiff's counsel in the case, and was admitted under objection. Catherine Cutler, the wife of Abraham, was the daughter of Peter Young. John J. Young quitclaimed to the children of Abraham Cutler, May 22, 1847; deed recorded October 8, 1849. A quitclaim deed from Eliza Ann, Catherine, Sarah, Minerva, Abraham, jun., M. V. Buren (Cutler,) De Witt Clinton (Cutler,) Mary and Julia Cutler, to Abraham J. Cutler, dated September 1, 1851, releasing all the right of grantors to the premises in consideration of $1, was given in evidence. Abraham Cutler (the elder) died July 1, 1854; Peter Young died August 5, 1855. Peter Young was examined *de bene esse* as a witness by the defendant, Sept 23, 1854, and his deposition read in evidence. Young testified (under objections of the plaintiff's counsel) that at the time of the deed from Barto to Jacob and John Young, they gave to Peter Young and wife a lease during their respective lives of the Young farm, the lease being now lost or mislaid. That he had never made any bargain with any one to give up his interest in the life lease. That when Jacob and John J. Young conveyed to the Cutler heirs, nothing was done about Young's interest in the life lease. That when he left the farm on the 9th of November, 1849, he gave up possession to Henry and Andrew J. Cutler, who agreed to support him and give him every thing he wanted for a living, and bury him when he was dead. That before the farm was bid off by Barto, Young claimed under a life lease, and before that under a title. Peter Young's wife died about a week before Peter Young gave up possession to Henry and A. J. Cutler. The plaintiff proved by J. S. Beebe that he was agent of S. B. Munn, and placed his demand against Cutler and Young in H. D. Barto's hands for collection. That after being satisfied that Munn's judgment was imperfect, he told Mr. Platt, Mowatt's attorney, to go on and sell under the Mowatt judgment, and he would pay him the judgment and take the title, which he did, and afterwards (February 28, 1828) sold the property to Abraham Cutler and gave him a deed. This was done under Barto's advice. That he never authorized Barto to convey to John and Jacob

Young, as he had the title in his own hands. There was some conflicting testimony as to the fact whether Peter Young or Abraham Cutler were in possession of the Young farm, which it is not deemed material to state.

The defendant's counsel moved for a nonsuit, on the grounds: 1st. That the defendant had shown an adverse possession in Andrew J. Cutler and those from whom he derived title, for a sufficient length of time to bar the claim of the plaintiffs. 2d. That there was an adverse possession shown at the time of the execution of the several deeds under which the plaintiffs claimed; that John and Jacob Young were in possession by their tenant, Peter Young. 3d. Notice was given to the Trust Company of the claim of Andrew J. Cutler at the time of the sheriff's sale under the decree. 4th. Baker had notice of this adverse claim when he purchased. A. J. Cutler was in possession by A. Brodrich, his tenant. 5th. Tyler had notice of Cutler's title before he purchased. 6th. That no docketing of the judgment of Mowatt had been proved. 7th. That neither the plaintiffs, nor those under whom they claim, had been in possession since 1819, and that the action was barred by the statute.

His honor the judge refused the motion for a nonsuit, and directed a verdict for the plaintiffs, subject to the opinion of the supreme court, at general term, on a case to be made by the plaintiffs, with leave to either party to turn the case into a bill of exceptions or special verdict.

John A. Collier, for the plaintiffs. I. The plaintiffs show a regular paper title and of record under Peter Young, the acknowledged original owner of the premises and source of title of both parties. The plaintiffs trace their title through a judgment against Peter Young, execution and sheriff's sale and deed, and being then the only title which the record disclosed, and this title was fortified: (1.) By a recovery in ejectment by Abraham Cutler against Peter Young, prior to the mortgage of Cutler to the Trust Company. (2.) By a decree in chancery in which both Cutler and Young were parties, and all

others known or which the record showed as having or claiming any interest, and by which all these parties were, in terms, declared to be barred and foreclosed of all title and claim to the premises.

II. Peter Young, and all persons claiming title or possession under him, are estopped from denying the plaintiffs' title: (1.) By the sale under the Mowatt judgment. (2.) By the decree in the foreclosure suit. (3.) By the recovery in ejectment suit upon the demise of Abraham Cutler, under whom the plaintiffs claim. This is at least a presumptive title, and conclusive against Young, as far as the right of possession is concerned, until he is reinstated by a new suit. After a sale under judgment and execution and sheriff's deed, the defendant in the judgment becomes quasi tenant at will. (*Jackson* v. *Sternbergh*, 1 *John. Cas.* 153. *McDougall* v. *Sitcher*, 1 *John.* 45, *and notes*. *Kellogg* v. *Kellogg*, 6 *Barb.* 116.) Nor can the defendant in the judgment set up another title out of himself, nor deny that he had the right of possession. (*Jackson* v. *Parker*, 9 *Cowen*, 84. *Jackson* v. *Graham*, 3 *Caines*, 188. *Jackson* v. *Hinman*, 10 *John.* 292. *Talbot* v. *Chamberlin*, 3 *Paige's Ch. R.* 219, 220.) So one who enters under a title from the judgment debtor subsequent to the judgment, through which the plaintiff claims, is equally estopped from denying the title of the defendant in the judgment. (*Idem.* 3 *Selden*, 525. 4 *John.* 202. 12 *Wend.* 57. 3 *Barb. Ch. R.* 528, 567.) Where during the pendency of an ejectment suit the defendant gave up possession to a third person, and the plaintiff afterwards recovered judgment in the suit, the third person is liable for mesne profits, and the judgment in the ejectment suit is conclusive evidence against him, and he cannot set up title in himself. (*Jackson* v. *Stone*, 13 *John.* 447. *Jackson* v. *Hills*, 8 *Cowen*, 290. *Morgan* v. *Varick*, 8 *Wend.* 593, 594. *Cowen & Hill's Notes*, 814.) Independent of the statute requiring notice of *lis pendens* to be filed, the rule was well established that the pendency of the suit was sufficient to charge all persons with notice, from the time of service of subpœna. (*Murray* v. *Ballou*, 1 *John. Ch. R.* 566, 577 *to* 580. 15 *John.* 309.) But, by statute, the filing of notice in the clerk's office is re

quired to charge other parties with notice. (2 *R. S.* 174.) And that was done in this case, before the deed from J. Young to the Cutler heirs. The record of a decree of foreclosure is evidence for the purchaser, in an action for the land, and cannot be impeached collaterally, or by a stranger. (*Fuller* v. *Van Geesen*, 4 *Hill*, 171. *Sinclair* v. *Jackson*, 8 *Cowen*, 543, 578.) Where the subsequent possession is acquired by recovery in ejectment, it affords a better presumption of right than the prior possession. (*Jackson* v. *Rightmyre*, 16 *John.* 314, 325. 13 *id.* 367, 377. *Jackson* v. *Walker*, 7 *Cowen*, 637.) After a recovery in ejectment the defendant cannot bring a new action until he has quit the possession, or the tenant has attorned to the plaintiffs. (16 *John.* 326. 1 *Salk.* 258.) And see 3 *John. Cas.* 295, to show that the judgment against the casual ejector is presumed to be regular. After judgment the lessor in an ejectment suit may enter peaceably, without the writ of possession. The judgment is evidence of his right of entry, so as to protect him as between the parties and privies, against an action of trespass. (13 *John.* 234, 235.)

III. There was no adverse possession shown in this case which was either sufficient to bar the plaintiffs' claim by lapse of time, or to avoid either of the deeds under which the plaintiffs claim title. At the time of the commencement of this suit, (August, 1854,) Peter Young was still living. He was examined as a witness in this cause, *de bene esse*, on the 23d of September, 1854. According to his testimony, (introduced by the defendant,) P. Young had a life estate in the premises, which terminated only at his death, which was on the 5th of August, 1855. Young, for a consideration, gave up the possession in November, 1849, to Henry and A. J. Cutler. A. J. Cutler then comes into possession under Peter Young, who swears expressly that he "never made any bargain with any body to give up his interest under the life lease;" that "noth ing was done about it." His being an estate for life, (if he had such a life lease,) it could only be transferred or conveyed by deed. Andrew and Henry Cutler became, therefore, mere ten ants at will under Peter Young. They could set up no title in

themselves if Peter Young had brought his suit to turn them out of possession, but would be estopped from denying his title. If Peter Young is estopped as against the plaintiffs, then most clearly A. J. Cutler and his temporary tenant would be also estopped. Whatever title Peter Young had, it has passed to the plaintiffs. Suppose Peter Young had remained in possession, and this suit had been brought against him, could he have set up any adverse possession against the plaintiffs, either to bar their right, or to avoid the operation of any of the conveyances under which they claim? It is quite clear that he could not; and if not, then it is equally clear that no person coming into possession under him can. As to this defense of adverse possession, it is not to be presumed, but must be proved. (*Jackson* v. *Parker*, 3 *John. Cas.* 124. 9 *John.* 163. 12 *id.* 365, 368. 20 *id.* 403. 9 *Barb.* 294. 12 *id.* 352, 356.) If the defendant did not originally enter under a hostile title, it will be intended that he entered under the owners. (9 *John.* 163. 12 *id.* 365.) "In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation by any one person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action." (*Code*, § 81.) And the claim of title must be "exclusive of any other right." (*Id.* § 82.) One claiming under a subsequent deed from a judgment debtor, has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. (*Jackson* v. *Collins*, 3 *Cowen*, 89, 92, 95.) If the purchaser from a lessee or tenant takes an absolute grant, under which he enters, yet in judgment of law he enters as tenant to the lessor, and is as much affected by the acts and acknowledgments of his predecessor as though they were his own. (*Jackson* v. *Davis*, 5 *Cowen*, 123, 129.) And this, whether the grantee knows of the demise or character of the tenant's occupation or not. (*Jackson* v. *Harsen*, 7 *Cow*

en, 323, 325.) And by statute, "whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of twenty years, and notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord." (2 *R. S.* 294, § 13.) In order to avoid a deed on the ground of adverse possession at the time of its execution, such adverse possession must be clearly made out by positive facts, and must not be left to inference or conjecture. (*Wickham* v. *Conklin*, 8 *John.* 220.)

IV. No title was acquired under the Munn judgment. The judgment itself was void as against purchasers or subsequent judgment creditors, for want of the specification then required by law, and it was so admitted by the attorney of Munn, who upon this ground yielded the priority to the Mowatt judgment, and avised the agent of Munn to take a title under that judgment, which was done. (*Laws of* 1818, *ch.* 259, § 8.) This act was afterwards repealed, but with a proviso that it should not in any manner affect prior judgments. (*Laws of* 1821, *ch.* 38.) If there ever was a sale under the Munn judgment, the sheriff gave no deed, and even if he had, it would be void as against the Trust Company, who, confiding in the records, which showed a regular title in Abraham Cutler under the Mowatt judgment, advanced their money upon the faith of that recorded title. The recording of the deed from Barto to Jacob and John J. Young, was no legal notice to the Trust Company or other persons of their claim of title. The mere recital of the purchase by Barto at sheriff's sale was not sufficient to charge third persons with notice. (*Murray* v. *Ballou*, 1 *John. Ch. R.* 566.) The chancellor says in that case, "by what clue was he to be directed to look into that deed. He might as well be required to examine the contents of every deed on record." (*Id.* 574.) Subsequent purchasers or mortgagors were only to look to it that there was no deed from Peter Young or Abraham Cutler, or from the sheriff. They were not to inquire or search the record to see what lands H. D. Barto had conveyed. (*Hook*

er v. *Pierce*, 2 *Hill*, 650.) No notice of the pretended life lease was to be implied from the possession of Peter Young. He was in possession at the time of the Mowatt judgment, and the purchaser under it. He was, prior to this judgment, the owner in fee. There was no apparent change in the possession after the life lease, if any ever existed. And Young put forth no such claim when he was called upon, in the foreclosure suit, to disclose his claim and defend his possession. (*McMechan* v. *Griffing*, 3 *Pick.* 149, 156, 7. 4 *id.* 257. 14 *Serg. & Rawle* 333, 4.)

V. The deed from the sheriff to Barto of April 22, 1853, was inadmissible. 1. It was executed after the plaintiffs' title had accrued and after suit was brought. 2. It was not recorded and the plaintiffs, and those under whom they claim, are bona fide purchasers without notice. 3. There was no proof of delivery to Barto. 4. The sheriff had no right to execute it after this lapse of time, (33 years after the sale,) and under the circumstances of this case.

VI. The deed from John J. Young to the Cutler children was entirely inoperative, and does not afford even a colorable claim to the title. It was executed May 22, 1847, being more than 26 years after the deed from Barto to John and Jacob Young, which was November 7th, 1820. For all this period this pretended title was dormant, and was not set up or asserted by any one. Jacob Young does not unite in this deed, although Peter Young speaks of it as if executed by both. It was a quit-claim without covenants. If this was deemed a subsisting title, why did not Peter Young set it up in his answer in the foreclosure suit, together with his pretended life lease, under them? His answer was filed October 25, 1853. On the contrary, Peter Young there claims title in fee, in his own name, and nothing was ever heard of any lease to Peter Young until he is examined as a witness in 1854. No such lease is recorded, none is produced, and it is proved only by parol, by an old grandfather of 90, whose answer and acts are inconsistent with its existence. On August 20, 1835, he mortgaged the premises as his own, to John De Mott. No rent is paid or demanded, nor is any thing

heard of the New Jersey Youngs for the 26 years Peter Young is contesting the mortgage with the Trust Company till September 30, 1846, which is the date of the decree. And then, May 22, 1847, Abraham Cutler presents himself in New Jersey, and procures a quitclaim deed from John J. Young to the young Cutlers, the children of Abraham, of whom 8 or 9 were minors, and the youngest only 7 years of age. This deed purports to convey the whole premises, without reference to the supposed life lease of Peter Young, or any reservation of his interest. If claimed as a conveyance in fee, it was void because of the adverse holding of Peter Young, who was in possession, claiming title for life. This title is asserted and reserved in his deed to the Cutler children, of June 27, 1845, and this without reference to John and Jacob Young.

VII. The technical objections to the deed under which the plaintiffs claim being out of the way, there is no remaining question about the plaintiffs' title. When the Trust Company advanced their money, the record showed a regular title in Abraham Cutler, by whom the mortgage was executed. There was nothing to show that a sheriff's sale ever took place under the Munn judgment. No sheriff's deed was ever executed; and if it had been, it was necessary to record it, or it would be void as against a bona fide purchaser. (13 *John.* 471. 8 *Wend.* 620. 15 *Wend.* 588.) The execution of the sheriff's deed since the commencement of the suit, (April 23, 1853,) while it is entirely ineffectual as against the plaintiffs, affords evidence that the defendant's counsel saw the necessity of supplying in some way a fatal defect in the defendant's title. This defect is not supplied by the partial execution of a deed 33 years after the sale and after the commencement of this suit, and where the deed, if fully executed at the proper time, being unrecorded, was void as against the plaintiffs' title.

VIII. If the plaintiffs acquired only the interest of Peter Young during his life they would be entitled to judgment, this term being unexpired at the time of commencing this suit. But they claim and are entitled to judgment for the whole premises in fee.

M. S. Newton, for the defendant. I. The defendant showed title paramount to that claimed by the plaintiffs. (1.) The judgment in favor of Stephen B. Munn vs. Abraham Cutler and Peter Young was signed, filed and docketed October 24, 1818. The judgment of Mowatt vs. Abraham Cutler and Peter Young, under which the plaintiffs claim, was docketed November 12, 1818. (2.) Henry D. Barto purchased at the sheriff's sale on the judgment in favor of Stephen B. Munn. (3.) The sheriff gave a deed, in pursuance of the sale, to Henry D. Barto. (4.) Henry D. Barto deeded to John J. and Jacob J. Young. (5.) John J. Young deeded to Andrew J. Cutler, the landlord of the defendant.

II. The judgment, by confession in favor of Stephen B. Munn, was valid. (1.) The specification was sufficient within the statute. The demands were notes, and "the origin and consideration of the same were stated." (*Laws of* 1818, *chap.* 259, § 9. 1 *Dunlap's Prac.* 362.) (2.) The judgment would be binding, until proceedings to have it vacated or set aside were taken. The act does not for a defect in the specification make the judgment void, but only fraudulent for certain purposes, and as to certain persons. It is valid as against the judgment debtor. (3.) Neither Beebe, nor those claiming under him, can object to the validity of the Munn judgment, for Beebe controled and owned both judgments, directed the sale on the Munn judgment, and received the proceeds. (4.) Abraham Cutler was one of the judgment debtors, and the plaintiffs claim under him. (*Seaving* v. *Brinkerhoof*, 5 *John. Ch.* 329. *Lawless* v. *Hackett*, 16 *John.* 149. *White* v. *Williams*, 1 *Paige*, 502. *Chappel* v. *Chappel*, 2 *Kernan*, 219.)

III. The deed from Nichol Halsey, sheriff, to H. D. Barto, was valid and effectual. (1.) It takes effect by relation from the time of the sale by the sheriff. (2.) The premises having been bid off by Henry D. Barto in his own name, but for the benefit of John J. and Jacob J. Young, and Barto having given John J. Young and Jacob J. Young a deed, with the understanding that the sheriff should make out a deed to Barto and have it recorded, and Beebe having received the purchase money from

John J. and Jacob J. Young, it was the duty of the sheriff to execute the deed, and upon his refusal the court would compel him to do so. (3.) It was proper that the deed, when given, should be delivered over to the then present owner, though Barto were named as grantee, the object being to supply a link in the chain of title. (4.) Beebe and Abraham Cutler, and all claiming under them, had notice, constructively by reason of possession, and actually, of the defendant's rights.

IV. The defendant not only showed title but continued possession under his title from 1820 to 1853, more than 30 years. (1.) The farm was bid off by Barto, for John J. and Jacob J. Young. (2.) Barto gave a deed to them, they paying the purchase money with the knowledge of Beebe. (3.) Peter Young, upon the giving of the deed by Barto to John J. and Jacob J. Young, took a lease from them, and continued in possession by virtue of, and claiming under, the lease exclusively till 1847. (4.) Barto was the attorney of Beebe and Munn and of Mowatt, after the purchase of Mowatt's judgment by Beebe. (5.) Beebe never took possession, or claimed possession, nor saw the land, or had any thing to do with it, except temporarily to hold the papers. (6.) Abraham Cutler did not take possession by virtue of his deed, and never had or pretended to have possession. He took the quitclaim from Beebe to assure the title to another lot, 67, which was included in the deed to Beebe.

V. The matters stated in the preceding points showed an adverse possession by the defendant, and those under whom he claimed, and by reason thereof the deeds under which the plaintiffs claim are void. (1.) At the time of the conveyance from Beebe to Abraham Cutler, and in 1828, John J. and Jacob J. Young were in possession by their tenant Peter Young, claiming title, and Abraham Cutler knew these facts. He was one of the judgment debtors in both judgments. (2.) At the time of the execution of the mortgage to the Trust Company in November, 1832, John J. and J. J. Young were also in possession claiming title. (3.) At the time of the conveyance to the Trust Company by the sheriff in 1852, Andrew J. Cutler had his deed from John J. and Jacob J. Young, was in possession claim

ing under this title, and notified the purchaser of his title, under J. J. and J. J. Young and his possession. (4.) At the time of the conveyance by the New York Life Insurance and Trust Company to Elijah Baker, April 12, 1852, Andrew J. Cutler was in actual possession, having and claiming title under John J. and Jacob J. Young; and Baker knew these facts. (5.) The same objections apply to the deed from Elijah Baker to Daniel Tyler, dated February 21, 1853. (6.) The same objections apply to the deed from Daniel Tyler to Charles Cook, dated February 15, 1854. (1 *R. S.* 739, § 160, [147].)

VI. The record in ejectment and the writ of possession, against Peter Young, the tenant, were not proper evidence, and could not impair the rights of the landlords, John J. and Jacob J. Young. (1.) There is no proof that John J. Young or Jacob Young had any notice of these proceedings by the defendant. (2.) There is no proof that Peter Young was ever removed or disturbed in his possession. The proof is the contrary. The return of the sheriff is only, "served as required," which was nothing.

VII. The copy of the deed from Peter Young to Andrew J. Cutler ought not to affect the rights of the defendants, for (1.) It was never accepted by or known to the grantees. (2.) Andrew J. Cutler was then an infant.

VIII. The answer of Peter Young in the foreclosure suit was incompetent. (1.) John J. and Jacob J. Young were not parties to the suit. (2.) The answer of the tenant could not affect the rights of the landlord.

IX. The mortgage to John De Mott, the lease and the declarations of A. Cutler are incompetent, for the reasons last mentioned.

X. Judgment should be ordered for the defendant, with costs.

By the Court, T. R. Strong, J. The title to the premises in question, in 1818, was in Peter Young; who is the common source of title of the respective parties to the action. In October of that year, Stephen S. Munn recovered a judgment against Young and Abraham Cutler, which was docketed on the

24th of October; and in November following, John Mowatt, jr. recovered a judgment against the same persons, which was docketed the 12th of that month. Executions were issued on these judgments; and under that on the Munn judgment the premises were sold to Henry D. Barto, the latter part of December, 1819, or early in 1820; under that on the Mowatt judgment the premises were sold to William Platt, about the same period. No deed was executed to Barto by the sheriff until the 22d of April, 1853. Barto conveyed to Jacob J. Young and John J. Young, by deed dated the 7th of November, 1820, which was recorded the 17th of the same month. In the description of the premises in this deed, it is stated that they were purchased by Barto at a sale by the sheriff under the Munn judgment. John J. Young conveyed to Andrew J. Cutler and others, the deed bearing date May 22, 1847, proved June 27, 1849, and recorded the 8th of October then next. The defendant is in possession of the premises as tenant of Andrew J. Cutler. A deed was executed by the sheriff to Platt, on the sale to him, dated February 2, 1820, acknowledged the same day, and which was recorded the 26th of February. Platt conveyed the premises to Jeremiah S. Beebe, by deed dated February 21, 1820, which was recorded April 2, 1828. Beebe conveyed to Abraham Cutler, the deed bearing date 27th February, 1828, and acknowledged and recorded the 11th of November following; and the latter executed a mortgage of the premises to the New York Life Insurance and Trust Company, dated the 29th of November, 1832, and which was recorded the 5th of December, 1832. This mortgage was foreclosed, and the premises were sold under the judgment in the foreclosure suit, to the mortgagees, who took a deed from the sheriff dated the 13th and recorded the 14th of February, 1852. The Company conveyed to Elijah Baker, by deed dated April 12th, 1852, acknowledged the 19th of April, and recorded the 31st of April, 1852, and the plaintiffs deduce title from Baker.

It will be seen from the foregoing statements and deductions of the titles of the parties, that at the time of the execution of the mortgage from Abraham Cutler to the New York Life In

surance and Trust Company, the mortgagor had a regular paper title to the premises, duly recorded, through the judgment of Mowatt against Peter Young; and that the records did not show any deed from the sheriff on the sale to Barto, the deed not having then been executed. The mortgagees were, therefore, under the recording acts, entitled to a preference for the mortgage over the title under the Munn judgment, unless at the time of taking the mortgage they had notice of that title. The record of the deed from Barto to Jacob J. and John J. Young, containing a recital of the sale under that judgment, was not such notice. There being no record of a conveyance to Barto, and no evidence of notice that he made any claim to the premises, they were not required to search for a conveyance by him, and were in no way affected by the record of such conveyance. (*Murray* v. *Ballou*, 1 *John. Ch.* 566.) No evidence was given of direct or actual notice to them of title in or through Barto. It appears, however, that Peter Young was in possession of the premises at the times of the sales under the judgments, and continued to possess the premises until 1850; and proof was given tending to show that he claimed the title under a life lease executed by Jacob J. and John J. Young to him at the time Barto conveyed to them; but there was no proof, beyond the possession, that the mortgagees knew what claim he made. Assuming that he had such a lease under which he occupied, was his mere possession, without any thing further, notice to third persons of the title by which he held possession? It is a general rule, that the possession of land is notice to others of the possessor's title. (4 *Kent's Com.* 179, *and notes to* 7*th ed.* *Tuttle* v. *Jackson*, 6 *Wend.* 213, 226. *Wright* v. *Douglass*, 10 *Barb.* 97. *Troup* v. *Hurlbut*, *Id.* 354. *Merritt* v. *Northern Rail Road Co.* 12 *id.* 605.) But it is not universally true; the notice is merely an inference; it may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title or claim. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation. In *McMechan* v. *Griffing*, (3 *Pick.* 156,) Wilde, J. says, "Sup-

pose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day he should make a second grant to a third person, who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase?" He adds, "To imply notice in such a case, is to presume a fact, without proof and against probability." In *Scott* v. *Gallagher*, (14 *Serg. & Rawle*, 333,) the facts were, that Gallagher and wife, on the 21st November, 1786, conveyed certain premises to one McCormick. The deed was regularly acknowledged and recorded. On the 29th November, 1786, a bond was executed by McCormick to Gallagher, whereby the former became a trustee, and the latter the cestui que trust of the premises. Scott deduced title from McCormick, the deed to him bearing date the 12th of July, 1790. Gallagher was then in the possession, and had retained the possession ever since the conveyance to McCormick, exercising every act of ownership over the premises. It was held, that notice of the trust could not be implied from this possession. Rogers, J. says, "Had then Scott such a notice of this agreement as to affect him? It is said that he had, because Gallagher continued in possession and received the rents and profits of the property until the commencement of this suit. How this can be notice of a parol agreement between Gallagher and McCormick, I am at a loss to conceive. Scott, who lived in the state of New Jersey, looked only to the deed in fee simple, given by Gallagher to McCormick, regularly recorded, and which never was divested by a deed of reconveyance from McCormick. He is not bound to call on the person who is in the possession of the land, to inquire of him whether he has a secret agreement with the owner of the legal title. If there be an agreement, it is the duty of the tenant in possession to spread it upon the records of the county, in order to prevent innocent persons from being deceived. A. sells a tract of land to B., and retains the possession; B. sells to C.; C. is not bound to call on A. to know whether there is not a secret agreement, adverse to the deed from A. to B., between them. He would be bound only by

those agreements which are consistent with his deed, such as a retention of possession, or payment of rent." In *Hewes* v. *Wiswell*, (8 *Greenl.* 94,) it was decided that possession was only implied notice, which might be rebutted. In *Woods* v. *Farmere*, (7 *Watts*, 382,) it was held that where the record shows a particular title in the possessor, the notice from possession will be restricted to that title. (*See Flagg* v. *Mann*, (2 *Sumner*, 487.) In the present case, Peter Young was the acknowledged owner of the premises in question, in fee; his entire title had been sold and conveyed under the Mowatt judgment; and the possession by him thereafter was of the same character as before, without any apparent change. I think, within the doctrine of the cases cited, the fair inference, and legal presumption, from his continued possession, was, that he was in under Platt, the purchaser and grantee of the sheriff, and those coming under him. It follows, that the mortgage lien must be preferred to the title of the grantees in the deed from Barto.

There was no such adverse possession as would avoid any of the conveyances in the plaintiffs' chain of title. Peter Young, while in possession, was estopped by the sale and conveyance under the Mowatt judgment from setting up another title in himself; he was also estopped by the decree in the foreclosure suit, to which he was a party defendant; and it is proved that Henry and Andrew J. Cutler went into possession about 1850, under an agreement with Peter Young to support him; he claiming a life lease as before stated, and who then surrendered the possession. They were therefore estopped, in like manner with Peter Young, from disputing the title sought to be enforced by the plaintiffs. (*Jackson* v. *Parker*, 9 *Cowen*, 84. *Jackson* v. *Graham*, 3 *Caines*, 188. *Jackson* v. *Hinman*, 10 *John.* 292. *Burhans* v. *Van Zandt*, 3 *Selden*, 525. *Jackson* v. *Harder*, 4 *John.* 202.)

The mortgage having priority, notice to the mortgagees of the hostile title at the time of the sale under the decree in the foreclosure suit, or subsequently to any persons claiming under that sale, cannot affect their title under the mortgage. The

protection which the mortgagees might claim, could not be impaired by a subsequent notice, and it extends to all claiming title through the mortgage, whether they had notice at the time of the purchase or not.

These views appear to me to dispose of the case, and to show that the plaintiffs, who have proved a regular deduction of title through the sale in the foreclosure suit, are entitled to judgment.

Judgment is accordingly ordered for the plaintiffs.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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62 297
58a 242

JOHN HENRY HERBERT ST. JOHN, an infant, by Beverly Robinson his guardian, HENRY JOSEPH ST. JOHN and FERDINAND ST. JOHN *vs.* JAMES PIERCE.

All the general provisions of the revised statutes relating to actions concerning real estate, where no specific inconsistent provision is made in the code on the same subject, remain in force, and are to be applied and adapted to actions under the code.

Whenever the code defines or declares a right, or provides a remedy, such provision must prevail, and repeal any and every inconsistent provision in the revised statutes.

The section of the revised statutes, declaring that the declaration in ejectment may contain several counts, and that several parties may be named as plaintiffs, jointly, in one count, and separately, in others, relates merely to the *remedy*, and is therefore repealed by the code, as being inconsistent with its provisions respecting the parties to actions, the form of actions, and with the whole scope of the code. WELLES, J., dissented.

Those provisions of the code are in conflict with the theory of separate counts in the name of separate plaintiffs, for the same cause of action, as in the former action of ejectment, and of separate counts in favor of the same plaintiff, for the same cause of action, as in other actions. WELLES, J., dissented.

The intent of section 455 of the code was that the change made in the form of the remedy should not affect any substantial right, nor change any provisions relating to the remedy that can be adapted to, and applied under, the code, in perfect consistency therewith.

St. John *v.* Pierce.

APPEAL by the defendant from an order made at a special term, overruling a demurrer to the complaint. The complaint was as follows: "The above John Henry Herbert St. John, (an infant under the age of twenty-one years, by Beverly Robinson, his guardian,) Henry Joseph St. John and Ferdinand St. John, plaintiffs in this action, show to the court, that the plaintiffs, John Henry Herbert, Henry Joseph and Ferdinand above named, on or about the first day of May, one thousand eight hundred and forty-five, were possessed of a certain lot or tract of land situated in the town of Naples, in the county of Ontario and state of New York, which premises are described as follows, to wit: [Describing the premises;] which premises the said plaintiffs claim in fee. And they, the said plaintiffs, being so possessed thereof, the defendant, James Pierce, on the first day of May, 1845, entered into the said premises and ejected the said plaintiffs, John Henry Herbert, Henry Joseph and Ferdinand, therefrom, and unjustly withholds from them, the said plaintiffs, the possession thereof, to the damage of said plaintiffs of one thousand dollars.

2. The plaintiffs further show, that the said plaintiff John Henry Herbert St. John, on the first day of May, one thousand eight hundred and forty-five, was possessed of a certain lot or tract of land, situated in the town of Naples, in the county of Ontario and state of New York, which premises are described as follows, to wit: [Describing the premises as before;] which premises the said plaintiff John Henry Herbert claims in fee. And the said plaintiff John Henry Herbert being so possessed thereof, the said defendant, James Pierce, on the first day of May, 1845, entered into the said premises and ejected the plaintiff John Henry Herbert therefrom, and unjustly withholds from him the possession thereof, to the damage of said plaintiff John Henry Herbert of one thousand dollars.

3. The plaintiffs further show, that the said plaintiffs, Henry Joseph St. John and Ferdinand St. John, on the first day of May, one thousand eight hundred and forty-five, were possessed of a certain lot or tract of land situated in the town of Naples, and county of Ontario and state of New York, which premises

are described as follows, to wit: [Same description as before;] which premises the said plaintiffs, Henry Joseph and Ferdinand, claim in fee, and they, the said plaintiffs, Henry Joseph and Ferdinand, being so possessed thereof, the said defendant, James Pierce, on the said day of May, 1845, entered into the said premises and ejected the said plaintiffs, Henry Joseph and Ferdinand, therefrom, and unjustly withholds from them the possession thereof, to the damage of said plaintiffs, Henry Joseph and Ferdinand, of one thousand dollars.

4. The plaintiffs further show, that the said plaintiff Ferdinand St. John, on the first day of May, one thousand eight hundred and forty-five, was possessed of a certain lot or tract of land situated in the town of Naples, in the county of Ontario and state of New York, which premises are described as follows, to wit: [The same premises described;] which premises the said plaintiff Ferdinand claims in fee, and he, the said plaintiff Ferdinand, being so possessed thereof, the said defendant, James Pierce, on the first day of May, 1845, entered into the said premises and ejected the said plaintiff Ferdinand therefrom, and unjustly withholds from him the possession thereof, to the damage of said plaintiff Ferdinand of one thousand dollars. Wherefore the plaintiffs claim judgment for the recovery of the premises herein before described, together with the damages aforesaid, and the costs of this action."

The defendant demurred to the complaint, and alleged and assigned as grounds of demurrer: 1st. That several and distinct causes of action between different parties, and in different rights, were improperly inserted therein. 2d. That a cause of action in favor of John Henry Herbert St. John alone was improperly united with a cause of action in favor of all the plaintiffs; and also with a cause of action in favor of his co-plaintiffs upon a separate, distinct and hostile title to that claimed by him. 3d. That the second and fourth counts were in favor of several plaintiffs upon their separate titles; and in respect to those there was a defect of parties—the other persons being improperly joined as plaintiffs, when they should have been made defendants. 4th. That the plaintiffs in whose favor the

first cause of action was prosecuted were improperly joined as plaintiffs in each of the other causes of action in said complaint. 5th. That the causes of action set forth do not affect all the parties alike. 6th. That there was a defect of parties plaintiffs 7th. That there was a defect of parties defendants. 8th. That several causes of action were improperly united. 9th. That the complaint did not state facts sufficient to constitute a cause of action.

E. G. Lapham, for the defendant.

H. R. Selden, for the plaintiffs.

E. Darwin Smith, J. The complaint in this action is confessedly in the form of a declaration in ejectment under the revised statutes. Before the revised statutes, by counting upon demises from different lessors, the plaintiff might claim and recover on different titles, and insert in his declaration as many counts as he pleased. The revised statutes abolished the use of fictitious names of plaintiffs and defendants, and of the names of any others than the real claimants and the real defendants, and the statement of any lease or demise to the plaintiff, and of an ejectment by any casual ejector. (2 *R. S.* 304, § 6,) But the advantage which the plaintiff had in the use of different demises, in the names of different lessors, was not relinquished thereby, but, except when the action was brought for the recovery of dower, the declaration might contain several counts, and several parties might be named as plaintiffs, jointly in one count and separately in others.

This is precisely what the plaintiffs have done in this case, and the question for the court is whether this form of proceeding is allowable in actions under or since the code. Section 111 of the code is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113." Section 113 excepts executors and administrators and trustees of an express trust, or persons authorized by statute to sue. Section 117 declares that all per-

sons having an interest in the subject of the action may be joined as plaintiffs. Section 118 provides that all who have an interest in the controversy adverse to the plaintiff, or who are necessary to a complete settlement or determination of the question involved in the suit, may be made defendants.

The rule in respect to parties, as contained in these sections, and in the 118th section and all others, *in pari materia*, show that the intent of the commissioners, as carried out by the legislature, was to adopt the rule of the courts of equity as there applied. (*Wallace* v. *Eaton*, 5 *How.* 99, 100. *Hollenbeck* v. *Van Valkenburgh*, *Id.* 281, 284. 1 *Code Rep. N. S.* 83. *Id.* 395.)

The rule in equity, as well as at law, required that the plaintiffs should have a joint or common interest in the subject matter of the controversy, or in the relief sought. Such a bill of complaint as the one in this cause could not have been sustained upon the rule in equity, before the code, in respect to parties.

The provisions in the code prescribing the manner of commencing and conducting suits and of receiving and entering verdicts and perfecting judgments, all imply that it was the purpose of the codifiers and of the legistature to have but one form of commencing suits, one simple and single remedy for legal and equitable causes of action. So far as relates to the form of the remedy, the language of the code is too explicit to admit of any doubt upon this head. But it is claimed that section 455 creates an exception. That section embraces all that is contained in a single title. Chapter five is entitled as follows: "General provisions relating to actions concerning Real Property." (§ 455.) *Provisions of Revised Statutes applicable* thereto. (§ 455.) "The general provisions of the revised statutes relating to actions concerning real property shall apply to actions brought under this act, according to the subject matter of the action and without regard to its form." The general provisions of the revised statutes relating to actions concerning real property are chiefly contained in chapter 5 of part 3 of the revised statutes, page 302, which is entitled, generally, "Of suits relating to real property."

This chapter has eight titles. 1st. Of the action of ejectment. 2d. Proceedings to compel the determination of claims to real property. 3d. Of the partition of lands. 4th. Of the act of nuisance. 5th. Of waste. 6th. Of trespass on lands. 7th. General provisions concerning actions relating to real property. 8th. Proceedings to discover the death of persons upon whose lives any particular estate may depend.

Section 455 is to be construed in connection with section 468 of the code, which repeals all statutory provisions inconsistent therewith, and section 471, which excepts certain other provisions of the revised statues. Express provisions are made in sections 448–50 and 453, and in section 471 of the code, for all the titles of said chapter 5 of the revised statutes except the first and the seventh. Nothing is left in that chapter for section 455 of the code specially to apply to, of said chapter five, except title 1, "Of the action of ejectment," and title 7, "General provisions concerning actions relating to real estate." These sections are not in the code of 1848, and were inserted first in 1849; and the section 455 was doubtless inserted for greater caution, to save all provisions relating to real estate whenever they might be in the revised statutes, which could stand with the code. Construing, therefore, sections 455, 468 and 471 together, I think it must be held that all the general provisions in the revised statutes relating to real estate, where no specific inconsistent provision is made in the code on the same subject, remain in force, and are to be applied and adapted to the actions under the code. Whenever the code defines or declares a right, or provides a remedy, such provision must prevail and repeal any and every inconsistent provision in the revised statutes. It is a cardinal principle that all laws once enacted remain in force until repealed; and the question in respect to any provision in the revised statutes, independent of section 468, would be whether it is repealed, expressly or impliedly. The whole question, therefore, upon this demurrer, turns upon the point, whether sec. 11 of chap. 5, title 1, part 3 of the revised statutes remains in force.

It seems to me that this section relates purely to the *remedy*

and is therefore repealed, as inconsistent with the provisions of the code in regard to the *parties to actions*, as above stated. to *the form of actions*, and to the *whole scope* of the code. The action of ejectment is not retained. Actions in regard to real estate are provided for in the code, and are to be commenced under it by summons and complaint, and are to be proceeded in and conducted in conformity therewith.

The code, in section 142, prescribes what a complaint shall contain. It is declared that it shall contain, 1st. The title of the cause, specifying the name of the court in which the action is brought; the name of the county in which the plaintiff desires a trial to be had, and the names of the parties to the action, plaintiffs and defendants. 2d. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3d. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. All other forms of pleading are *abolished*. (§ 140.) These sections are in conflict with the theory of separate counts in the name of separate plaintiffs, for the same cause of action, as in the former action of ejectment, and of separate counts in favor of the same plaintiffs, for the *same cause* of action, as in other actions. (*Lackey* v. *Vanderbilt*, 10 *How.* 161. 9 *id.* 552.) Section 167 is also directly in conflict with the form of pleading adopted by the plaintiffs in this action. In providing for the joinder of different causes of action it says: "But the causes of action so united must all belong to one of these classes, and *must affect all the parties to the action*," &c. The first count in the complaint in this action affects all the parties to the action; the three other counts do not. They are each separate counts in favor of the plaintiff, separately stating distinct causes of action in favor of the several plaintiffs.

It is to be borne in mind that section 455 does not repeal any provision of the code. It is part of the code itself, and is to be construed in connection with the other provisions thereof, and as forming part of one system. It provides not to continue any previous form of action or modes of proceeding independ-

ently, but directs that the general provisions of the revised statutes relating to actions concerning real property, "*shall apply to actions brought under this act.*" The action is to be instituted. conducted, regulated and determined in all its particulars as prescribed in the code, but substantial rights are to be maintained, asserted and enforced in and by "*the actions brought under this act,*" "according to the subject matter of the action and without regard to its form." The form is to be that of the code. All the incidental provisions of the action of ejectment, for instance, are to be adapted to the action under the code, not inconsistent with it and without respect to form. The intent of this section, 455, as I construe it, is that the change made in the form of the remedy shall not affect any substantial right, nor change any provisions relating to the remedy that can be adapted to and applied under the code in perfect consistency therewith. But the rule of the code is, in all cases, to prevail where there is any inconsistency between it and the former provisions of the statute. The first count, for instance, in this complaint, is in the form prescribed for a declaration in ejectment in the revised statutes. I think it a good count, and can see no objection to the use of this form of complaint under the code, whenever the plaintiff thinks proper to dispense with a verification of his complaint.

But, under the code of 1848, this form of a complaint could not have been used in all cases, for that act required all pleadings to be verified; and in many cases a plaintiff could not verify his complaint in the form prescribed in the revised statutes for a declaration in ejectment.

The action of ejectment was anomalous before the code, but I think the codifiers did not intend to have any such anomaly remain. They clearly intended to have one uniform system of practice and pleading and proceeding in all civil actions, and it would be in utter conflict, in my opinion, with the whole principle, theory and policy of the code, to allow a variety of counts in the form presented in the complaint in this action. But such a mode of declaring is entirely unnecessary. The

codifiers intended to allow great latitude in regard to parties. They say, "We have intended to leave suitors very much at liberty to choose whom to make defendants and whom to join as plaintiff. No person can be affected by a judgment but a party, or one who claims under him. This rule will make the plaintiff bring in all the parties whom he wishes to affect. The judgment, as we have provided by section 161, can be given for or against any one or more of the plaintiffs or defendants. This will save the plaintiff from the hazard now encountered in bringing in too many parties, except that of paying costs." (*See* 1*st Rep. of Com.* 124 *and* 122.) Section 274 of the code, in respect to the entry of judgment, adopts the precise rule as it existed in the action of ejectment. (2 *R. S.* 307, § 30.) The 274th section of the code is as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side as between themselves." Under this section some of the plaintiffs in this action may recover, according as the title may appear at the trial, while the defendant may have judgment against the rest, upon the first count in the complaint, in which the plaintiffs are all joined in the same manner and to the same effect as would have been practicable under the old form of ejectment under different counts. The court can render judgment according to the right of the case, as it appears at the circuit, and can amend the pleadings and dismiss the complaint as to some of the plaintiffs or defendant, so as to do substantial justice. This is a part of the liberal policy of the code to free litigation from the technicality and too strict adherence to forms, which had brought much reproach upon the administration of justice. A discreet exercise of the powers of the court to make amendments, to disregard variances and decide upon and give effect to the rights of the parties as disclosed on the trial of causes, and without regarding too strictly the mere consideration of form, will best carry out the object of the code and further the ends of justice. In this view of the duty of the court in respect to actions like the present, plaintiffs can suffer no wrong or injury for the want

of different counts in their complaints in the names of different plaintiffs.

The demurrer in this case is to the whole complaint, for a misjoinder of causes of action, not in the same right or between the same parties. In order to take advantage of this objection the defendant was bound to demur. (*Code*, § 148.) And although the first count of the complaint is a good one, we cannot separate it from the three counts improperly joined with it, and the demurrer must therefore be sustained to the whole complaint.

The decision of the special term should be reversed upon the usual terms.

T. R. STRONG, J., concurred.

WELLES, J., dissented.

Judgment reversed.

[MONROE GENERAL TERM, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

ADALINE COLVIN, adm'x, &c. *vs.* SARAH ANN CURRIER and GEORGE W. CURRIER.

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1L 520
3L 123
18a 280
42a 641

Where work and labor are performed and materials furnished, by a carpenter, in erecting buildings upon the separate estate of a married woman, at the request of her and her husband, and the husband is insolvent, the wife's separate estate may be charged, in equity, with the payment of the debt. T. R. STRONG, J. dissented.

The separate estate of a married woman, in real property owned by her, since the acts of 1848 and 1849 in relation to married women, is none the less a *separate* estate because it is a *legal*, instead of an *equitable*, estate.

And where such separate estate has been benefited, and increased in value, by erections made thereon, upon the faith of such estate, and the creditor will be remediless unless payment out of such estate be enforced by a court of equity, jurisdiction will be entertained by those courts, on the ground that it is a

part of their duty to prevent acknowledged wrongs, and to protect acknowledged rights, when courts of law are inadequate to afford relief.

The only difference between the separate estate of a married woman, as previously recognized and acted upon by courts of equity, and their title to property acquired or held under the acts of 1848 and 1849, is, that the former is an equitable, and the latter a legal, estate or title. *Per* WELLES, J.

And giving relief to creditors against the separate estate of married women acquired or held under the acts of 1848 and 1849, is only extending an ancient and well established principle of equitable jurisprudence to a state of things created by the legislature and which is clearly within the reason and necessity of the principle. *Per* WELLES, J.

APPEAL by the plaintiff from a judgment entered at a special term, allowing a demurrer to the complaint. The plaintiff, in his complaint, alleged the death of Ethan Colvin, intestate, in March, 1854, and the appointment of the plaintiff as his administratrix; and that Sarah Ann Currier was, on the 1st day of January, 1852, seised in fee of a piece of land particularly described in the complaint, in her own right; and that at that time the said George was and ever since has been the lawful husband of the said Sarah Ann; and that, shortly after the time aforesaid, they contemplated building and did build on the land a dwelling house and other buildings, during the life time of the said Ethan Colvin; and that they employed Colvin, he being a carpenter and joiner by trade, to do work on the buildings, and that he worked on the buildings and furnished materials in and about said work, at their request, and which they undertook and promised to pay; that, by means of those services and materials furnished, the premises were increased in value from six hundred to five thousand dollars; that the materials furnished and the work done was worth six hundred dollars; that George W. Currier is irresponsible, and that the plaintiff has no means of collecting the demand except out of the separate property of the defendant Sarah Ann Currier, who undertook and promised to pay the same. The plaintiff demanded judgment or decree that the demand be paid out of the separate estate of the said Sarah Ann Currier. To the com plaint the defendant Sarah Ann Currier demurred, on the following grounds: "That it appears upon the face of the said

complaint that there is a defect of parties defendant, the defendant being joined as a defendant with her husband, George W. Currier. That it appears upon the face of the complaint that several causes of action have been improperly united, and different causes of action against this defendant and against the defendant George W. Currier. That the complaint does not state facts sufficient to constitute a cause of action against this defendant."

A. Lathrop, for the appellant. I. The only test that can be adopted to ascertain whether an estate or interest be legal or equitable, is to inquire whether it comes under the peculiar province of a court of law or equity to protect it. If an estate or interest be such as to bring it within the peculiar province of a court of equity, to preserve, protect or take charge of it, then it is called an equitable estate or interest; and whether it be such an estate or interest as requires a court of equity to look after it, always depends upon the peculiar state of facts which surround it, in connection with the rules of law applicable to it; and the question here is, whether by the rules of law, as they existed at the time the debt was contracted, the facts bring the case within the peculiar province of a court of equity; if so, then the defendant's estate must be denominated equitable estate; otherwise not.

II. There can be no question that a *separate estate of a feme sole*, whatever its nature, kind or quality be, has always been regarded as an interest, under the peculiar province of a court of equity, to look after it and protect it. And hence such an estate is denominated an equitable estate. The only question there can be any doubt about, is as to what amounts to a *separate estate.* I apprehend it must be regarded as pretty well settled, that no estate in a *feme sole* in lands can be regarded as a *separate estate*, where the husband has also rights and interests in the same lands, both interests existing at one and the same time. (*See Mr. Justice Jewett's opinion in the Albany Fire Insurance Co.* v. *Bay*, 4 *Comst.* 11, 12; *and Pratt's opinion*, 27, *and the cases by them cited.*) The reason

was, that no charge on her interest could be made or otherwise interfered with, very well, without prejudicing the rights of the husband. The court of equity therefore took no control over it, and it was not called an equitable estate, but was regarded as a legal estate.

III. It is not material how the *feme sole's* estate was held, in respect to the person holding it, whether in her own right or by some one else in trust for her; the point was, whether it was free from the control of her husband, that is, whether the husband had any interest in it. It is undoubtedly true that before 1848 it must be held by some one other than herself, because, if she held it in her own right, that fact alone vested an estate in her husband; and hence it could not be a *separate estate*, for the material quality necessary to make it *separate* was destroyed the moment the legal title vested in her own right; so that formerly, in order to constitute it a *separate estate* within the equity rule, it must be held by some one other than herself, because this was the only way to prevent the husband taking an interest. But the law in this particular has been changed by the statutes of 1848 and 1849, so that now, when the wife holds the estate in her own right, the husband takes no interest in the land whatever; she therefore has a *separate estate* in the land, free from the control of her husband, within the meaning of the equity rule, and the estate must therefore be denominated an equitable estate, and liable to be charged in equity with this debt. (*See Mr. Justice Harris' opinion in Chapman* v. *Lemon and Wife*, 11 *How. Prac. Rep.* 236.)

IV. A married woman cannot, as a universal rule, contract a debt charging herself personally; but if she hold an estate *separate* from her husband, and *independent of him*, chancery considers her *separate* debt, incurred by her expressly, on her own account, as a valid charge *pro tanto*, or will at least enforce its collection separately, by fixing it as a lien upon the separate estate. (*Gardner* v. *Gardner*, 22 *Wend.* 526.) And thus she may incur a debt even to her husband, chargeable on her separate estate. (*Id.*)

V. By the law of England and America, a married woman is

incapable, in any case, of becoming a party to a bill of exchange so as to charge herself with any obligation whatever, ordinarily arising therefrom. This results from her general disability to enter into any contract, under the common law; for, during the marriage, her very being or legal existence as a distinct person is suspended, or at least is incorporated or consolidated in that of her husband. There are certain exceptions recognized by courts of equity. (*Story on Promissory Notes*, 92.)

VI. A *feme covert* having a separate estate settled upon her, is liable in equity upon a bill accepted by her, though for the benefit of a third person. When a married woman borrowed money and gave her promissory note payable on demand with interest, on a bill filed against the husband, wife and trustees acting under a marriage settlement, it was decreed that the debt should be paid out of the rents and profits of the estate settled to her separate estate. And so when she gave a note jointly with her husband as a security for his debt. (*See Chitty on Bills, ed. of* 1839, *p.* 24, *and authorities there cited.*)

J. N. Pomeroy, for the respondent. I. Two causes of action have been improperly joined in the complaint. (1.) Assuming that, when properly stated, these causes of action may be joined, still in this complaint they are improperly mingled and not distinctly stated, which is a sufficient ground of demurrer. (1 *Whittaker's Pr.* 370. *Id.* 461, 462. *Durkee* v. *Saratoga R. R.*, 4 *How. Pr. R.* 226.) (2.) But these causes of action cannot in any wise be joined in one complaint. The complaint, in substance, states a cause of action for work and labor and materials, and demands judgment therefor against both defendants, husband and wife. It also states a cause of action for equitable relief, not against the wife personally, but in the nature of a proceeding *in rem* against her separate real property. These two causes of action do not come under subdivision 1 of § 167 of the code. They do not "both arise out of the same transaction, or transations connected with the same subject of action." Nor do they come under subdivision 2 of the same section. They do not both "arise out of contract

express or implied." But even if these two causes of action should be considered to fall under the subdivisions mentioned, still they are within the limitation contained in the last subdivision of § 167; for they do not "affect all the parties to the action." One cause of action only affects the wife, and the other only affects the husband, although judgment is asked against the wife. They "require different places of trial." The cause of action against the wife must be tried by a judge at special term, and cannot be tried by a jury, when the other cause of action must be tried before a jury at the circuit court. They are not "separately stated." (1 *Whittaker's Pr.* 369 *to* 375, 2*d ed. and cases cited. Tompkins* v. *White, in point,* 8 *How. Pr. R.* 520.)

II. The facts stated in the complaint do not show that the plaintiff is entitled to the equitable relief prayed for against the property of the defendant, Mrs. Sarah Ann Currier. The complaint is framed upon the doctrine that a court of equity will charge a wife's separate estate with her debts created during coverture, where from her acts, directly or impliedly, there appears an intention to charge the estate. The doctrine fairly and broadly stated is this: that when a married woman has a separate estate entirely without the control of her husband, and entirely under her own control, limited for her sole and separate use, and during coverture she create debts by contract, which she expressly charges upon such separate estate, or impliedly by her acts evinces an intention to make such a charge, or if the debts be created for the express purpose of benefiting such separate estate, a court of equity will enforce the debt against the estate, by a proceeding virtually *in rem*, and not *in personam*. This doctrine is fairly to be deduced from the following authorities: *Jaques* v. *Methodist Church*, (17 *John.* 548;) *North American Coal Company* v. *Dyett*, (7 *Paige's Rep.* 9; *S. C.*, 20 *Wendell's R.* 570;) *Vanderheyden* v. *Mallory*, (1 *Comstock's R.* 452;) 2 *Story's Eq. Jur.* §§ 1397, 8, 1400, (*n.* 1,) 1401, *and cases cited in the text and notes.* (1.) The doctrine relied on applies only to a wife's equitable estate, held by her to her own use and under her own control, entirely free

from the claims and management of her husband, and does not apply to her legal estate held by her absolutely. All the reasons of the doctrine fail where it is applied to a wife's estate held by her in fee. The ground and reasons of the rule are submitted to be the following: The wife's separate estate is a mere creature of equity, designed expressly to relieve a wife from the strict rules of the common law, which did not allow her to contract so as to bind herself or her estate during coverture. (2 *Story's Eq.* § 1378.) A married woman who holds a separate estate may receive it from her husband, from strangers, or by devise. It must always come by purchase, as distinguished from an estate which comes by descent. It may be created by marriage settlement or otherwise; it does not require strict words to create it, but it must appear that the estate conferred upon the wife was intended to be held by her to her sole and separate use, and free from the control of her husband. (2 *Story's Eq.* §§ 1379 *to* 1382.) Such being the nature of a married woman's separate estate as regarded in equity, it is plain from the doctrines of the common law that a creditor of the wife could have no relief against such property. To relieve this apparent injustice, equity interposes; and equity only interposes, because in such case the law is powerless. (2 *Story's Eq.* §§ 1397, 8.) The books give two grounds for this equitable doctrine: the elder cases put it on the ground that a wife's separate estate, being a mere creature of equity, equity would regard her, in reference to such separate estate, a *feme sole*, and would therefore treat her property as if she were really single. (2 *Story's Eq.* § 1401, *and cases cited. Hulme* v. *Tenant*, 1 *Bro. Ch. R.* 16. *See also Murray* v. *Beekman*, 4 *Sim.* 82; 3 *Myl. & Keene*, 209; *and* 2 *Story's Eq.* § 1400, *n.* 1.) The modern cases put the doctrine on the ground that the wife's act of contracting the debt is evidence of an intention to charge her separate estate by appointment, or by contract in the nature of an appointment. (2 *Story's Eq.* § 1401, *and cases cited.*) Whichever ground or reason of the rule be adopted, it is plain that its only application is to the wife's separate or equitable estate, and not to her legal estate—not to

land held by her in fee. If we assume the old exposition of the rule to be the true one, there is no escape from our conclusion. Equity does not invade the rules of the common law to the extent to regard a wife as a *feme sole*, in reference to her property generally, held by her absolutely in her own right; the very reason of this exposition of the rule is founded upon the fact, that the separate estate is held by her to her own use as an equitable estate. Assume the modern construction to be correct, and rest the plaintiffs' claim upon the idea that the wife's contract is to be considered in the nature of an appointment. The very idea and meaning of an appointment has reference only to an equitable estate. Who ever heard, or how could it be possible, that the wife should execute a power by appointment over her real property of which she holds the fee; the idea is absurd. The only way in which a married woman can dispose of real property held by her absolutely in her own right, is, at the common law, by suffering a fine or recovery, and under our statutes, by a solemn conveyance. (2 *Story's Eq.* § 1391.) From this examination of the rule in equity, and of the reasons of the rule, it is plain that it only contemplates a wife's separate estate as such, as distinguished from the legal estate which she may hold in lands in her own right. Not a case can be found in which a wife's legal estate has been charged with her debt in this manner. All the cases show that the estate charged was an equitable one, held by the wife to her sole and separate use, free from the control of her husband. But this direct point has been decided in a case in the court of appeals. The case (*Fireman's Insurance Co.* v. *Bay*) is first reported in 4 *Barb.* 407; the action was brought to foreclose a mortgage executed by the wife. The estate in her was a reversion in fee in her after a trust estate limited during the life of her husband. The court below applied the equity rule we have been considering, and held that the wife had a separate estate, and that her mortgage was an appointment. The case was carried to the court of appeals and this doctrine directly overruled. (4 *Comst.* 9, 11, 26, 27.) (2.) The plaintiff, upon her own showing, has a clear remedy against the husband at law, and equity will not

interfere to help her reach the property of the wife. The contract of the husband and wife, stated in the complaint, is the contract of the husband. He is the person liable, and the plaintiff can obtain a judgment against him for the debt. This is an elementary principle of law. The complaint states an estate in fee in property, in the wife. The husband has a freehold estate in the wife's property held by her in fee, depending upon the continuance of their joint lives. If she have issue, then the estate in the husband continues during his life. This estate of the husband may be seized and sold upon execution against the husband, and the husband would take his life estate, and would be entitled to possession and the pernancy of the rents and profits. (2 *Kent's Com.* 130, *and cases cited.*) The plaintiff's remedy is to obtain judgment against the defendant, George W. Currier, and sell his life estate in his wife's real property, held by her in fee. (3.) The "Married Woman's Property Act" of 1849 does not affect the right of the plaintiff in this action. If the plaintiff claims that the statutes of 1848 and 1849 have here the effect to make all real estate of a wife such a separate estate as is contemplated by the equitable doctrine upon which this action is founded; in other words, if the plaintiff rests her rights on the operation of the statute, then she should have shown that the defendants are within the statute; she should have made affirmative allegations showing that the land came to the wife since the act, or that the defendants were married since the act. (*Benedict* v. *Seymour*, 11 *How. Pr. R.* 176.) Whatever may be the effect of the statutes in question, they do not turn the wife's legal estate into an equitable separate estate. The wife's estate is still a legal estate; she has no power to make contracts, or to do any act under the statute which she could not do under the common law, except that she can make a will. She cannot make a deed except with her husband's consent. In the language of the opinion of Mr. Justice Strong, "As to her legal estate, all of the legal disabilities of a married woman attach to it." It is submitted, that even supposing that it must be conceded on the papers in this suit that these statutes apply to these parties, still these

statutes can in no way be construed so as to abolish the husband's estate by the curtesy.

E Darwin Smith, J. If the premises on which the plaintiff's husband in his lifetime erected a dwelling house, at the request of the defendant Mrs. Currier and her husband, were the separate estate of Mrs. Currier, in the sense and language of a court of equity, there can be no doubt that such property would be liable for the payment of the plaintiff's debt, contracted as it was on the faith of the undertaking and agreement of Mrs. Currier, and for the benefit and improvement of her estate.

Since the decision of *Jaques* v. *The Methodist Episcopal Church*, in the court for the correction of errors, (17 *John.* 548,) the doctrine that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property by appointment, or bind it by debts contracted for the benefit of the estate or for her own benefit, upon the credit of such separate estate, may in this state well be regarded as settled law. This doctrine has been since repeatedly applied in the courts of this state, and twice since has been reasserted by the court for the correction of errors; first, in affirming the decision of the chancellor, in the case of *The North American Coal Co.* v. *Dyett*, (7 *Paige*, 9,) and again, in the case of *Gardner* v. *Gardner*, (22 *Wend.* 526.) In the latter case Judge Cowen states the rule very clearly. He says, "If the wife holds an estate separate from and independant of her husband, as she may do in equity, chancery considers her in respect to her power over this estate a *feme sole;* and although she is incapable of charging herself at law, and equally incapable in equity of charging herself *personally* with debts, yet I think the better opinion is, that separate debts contracted by her expressly on her own account shall, in all cases, be considered an appointment or appropriation for the benefit of the creditor, as to so much of her separate estate as is sufficient to pay the debt."

This right of disposition has been regarded as absolute, unless the wife was specially restrained by the instrument under which

she acquired the estate, and except also that it was for some time doubted whether she could convey her separate estate by deed without the concurrence of her husband. This doubt is however finally solved by the decision of the court of appeals in *The Albany Fire Ins. Co* v. *Bay*, (4 *Comst.* 9.) This doctrine is not questioned by the learned judge who decided this case at special term. The demurrer was sustained, not upon the ground that the plaintiff's debt would not be a charge upon the separate estate of Mrs. Currier, in equity, but on the ground that her estate was strictly a *legal* and not an equitable one. The learned judge says, "A merely legal estate of the wife, although under the present statutes of this state she may hold it to her sole and separate use, and convey and devise it as if she was unmarried, and the same is not subject to her husband's disposal, or liable for his debts, is not a separate estate, in the sense of those words, in the law relating to married women." It seems to be supposed by my brother STRONG that the acts of 1848 and 1849, in relation to married women, have created a separate estate absolute and unqualified in the wife as a distinct *legal estate*, to which the doctrine of courts of equity, in regard to the separate estate of married women, as above stated, does not apply. To this view of those statutes, and their force or construction, I cannot agree. The separate estate created by those statutes, I insist, is not without the jurisdiction of this court, any more than if it were the separate estate known to the courts of equity before the passage of those acts. The reason of the law applies to such estate, as much as if it were created by a marriage settlement, or a devise or conveyance to trustees for the benefit of a married woman. A *separate estate* belonging to a married woman should be considered the separate estate recognized by a court of equity, however acquired. A married woman is under the particular jurisdiction of this court, considered as a court of equity. She cannot be sued at law. This court disregards the disability of coverture, and treats her as a *feme sole* for her benefit; and it allows her to sue and be sued as such, in respect to her separate property. At the common law she could neither sue nor be sued, and scarcely had a single

recognized right, separate and apart from her husband, in respect to property. Her legal existence was deemed merged in his. She and her husband constituted one person.

The husband at common law was entitled to the personal property, including choses in action of his wife at marriage, and had a freehold interest in her legal estate. (*Co. Litt.* 351, *a and b. Clancey's Rights of Married Women*, 161.) These strict rules of the common law have been gradually relaxing, through the intervention of courts of equity, in modern times. Through marriage settlements, devises and conveyances in trust, upheld and enforced in courts of equity, the right of married women to have separate estates, independent of their husbands, has long been recognized.

The acts of 1848 and 1849, were statutes passed in furtherance of the policy of relaxing the strict rules of the common law in respect to married women. Those acts repeal the common law rules giving the husband a right to the personal property of the wife, and a freehold interest in her estate of inheritance, and subjecting the same to the payment of his debts. Those statutes are but the adoption of the equitable rules of this court considered as a court of equity, and applying those rules to all property of the wife, whether legal or equitable. These acts were designed to take away the marital rights of the husband in respect to such property of the wife. The evil complained of was the too great subjection of the property of the wife, at common law, to the control of the husband and his creditors. The remedy was to apply the rule of this court, in respect to the separate property of married women, to all property belonging to the wife. It is true the property is thus converted into a legal estate, but it is none the less a *separate estate, independent of the husband.* In respect to her separate estate in equity, the wife, we have seen, could be sued, and her estate charged with her debts. The acts of 1848 and 1849, although they allow the married woman "to hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she

was unmarried, and provide that the same shall not be subject to the disposal of her husband, nor liable for his *debts*," do not allow her to make contracts, except in respect to such property, and they do not allow her to be sued in courts of law. In respect to all other of her contracts they are void still, as at common law, and the contracts which she may make are only cognizable, and capable of being enforced, in a court of equity. So far as the courts of law are concerned, the disability of coverture still remains, in respect to all the contracts or property of married women.

It is, I think, a mistake to consider the jurisdiction which courts of equity in England and in this country have long exexercised over the separate property of married women, as depending entirely upon the doctrine of trusts. But if uses and trusts were connected with the origin of this jurisdiction, it has been upheld for more than a century without respect to such origin. (*Story's Eq. Jur.* § 1380.) The civil law treats husband and wife as distinct persons, capable in a limited sense of contracting with one another and of suing each other, and of having separate estates and interests. (2 *Story's Eq.* § 1368. 1 *Fonb. Eq. B.* 1, *ch.* 2, § 6, *and n. A.*) A wife may in equity, in cases respecting her separate estate, be sued without her husband, although he is ordinarily joined, for the sake of conformity to the rule of law, as a nominal party, whenever he is within the jurisdiction of the court and can be made a party. (2 *Story's Eq.* § 1368.) This whole doctrine in regard to the separate rights of the wife is borrowed from the civil law. It was long since adopted in courts of equity. It is the chief basis upon which jurisdiction over married women rests, in this court; and this court has no right to relinquish such jurisdiction. The right to sue married women in respect to their separate property, as it exists in this court, is a very important right, and must be exercised until the legislature takes it away. This court never relinquishes jurisdiction once acquired, and this is a cardinal rule in chancery. (1 *Story*, § 64. 3 *Bro. Ch. R.* 218 6 *Vesey*, 812. 7 *id.* 19, 21. 9 *id.* 468.) The acts of 1848 and 1849 contain no evidence of the intention of the

legislature to strip this court of its jurisdiction over married women or their estates, or to exempt the separate estate created under or by those acts from the equitable principles of this court as applied to the separate estates of married women; and to hold that such is their effect, is to place the separate legal estate of married women virtually out of the pale of the law; to create a species of property entirely new in the legal nomenclature, placing in the hands of married women a sword to be used as an instrument of fraud and dishonesty, instead of giving to them a shield against imposition and hardship in the exercise of the well known rights of the husband at common law.

But whatever may have been the object of the legislature, it is the duty of the courts of equity to continue to apply its principles of remedial justice to all cases, as they arise, within the just scope and reason of those principles, until the legislature expressly forbids such exercise of its powers.

The view which I have taken, I think, is sustained by the decision of the learned judge who wrote the opinion of the court in the case of *The Fireman's Ins. Co.* v. *Bay*, (4 *Barb.* 414.) Judge Parker there says, a "*separate estate* exists in the wife where the husband has no interest in her property and no control over it, and where it is not liable to the payment of his debts." And "if it be in fact a separate *estate*, I do not see that it is at all material to inquire how the estate was created." The estate of Mrs. Currier is clearly a *separate estate* in this sense; it is free from the control of her husband. My brother STRONG does not deny this, but says it is a *legal* estate. That makes it, I think, none the less a separate estate. It matters not, as says Judge Parker, "*how it was created.*" It is just as *separate*, as completely so, if a *legal*, as if it were an equitable estate. This decision was affirmed in 4 *Comst.* 9, and Judge Jewett, in describing or defining the *separate* estate, uses pretty much the precise language of Judge Parker. But Judge Pratt, in a dissenting opinion in that case, (page 27,) says that "Separate estates in married women which courts of equity recognized their right to dispose of as *femes sole*, are strictly equitable estates." This was doubtless so before the passage

of the acts of 1848 and 1849. But that case arose before the passage of those acts, and was decided irrespective of them; and the case does not conflict in any respect with the view which I take of the effect of those acts. Judge Pratt does not mean to assert, I presume, that equity may not reach the separate estates of married women, when such estate shall actually exist, however created. Separate estates of married women, before the acts of 1848 and 1849, were necessarily equitable estates; for the wife could have no distinct separate legal estate, free from the control of the husband, and from the reach of his creditors. (*See also Willard's Eq. Jur.* 643.) Since the law, however, recognizes, as it now clearly does, under the acts of 1848 and 1849, a strictly legal separate estate in married women, without subjecting it or them to the ordinary jurisdiction of the courts of law, it seems to me that in this court, as a court of equity, it is a sufficient basis for jurisdiction over such property for the enforcement of debts for the benefit or on the credit thereof, that a *feme covert* is free from the disability of coverture, and may sue and be sued as a *feme sole*, in respect to her separate property. But aside from this basis of jurisdiction, the very existence of a court of equity furnishes another, upon original principles. The power of courts of equity in England, in early times, was principally applied to remedy defects at common law, and for the same reason which constitutes now the principal reason for their existence and interference, to wit, "that a wrong is done for which there is no plain and adequate and complete remedy in the courts of law."

If the property of the defendant, Mrs. Currier, cannot be reached to enforce payment of the plaintiff's debt, the plaintiff is clearly remediless, and a gross wrong and immorality is committed. Her separate estate has been increased largely in value, as the bill states, much beyond its original worth, in consequence of the work done and erection thereon made by the plaintiff's husband. If the legal estate were in the wife, as before the acts of 1848 and 1849, the husband would be liable for the debt, and his freehold interest in it might

have been sold upon execution. But now the plaintiff has no remedy at law, and a gross fraud is, or will be, perpetrated, unless this court can enforce payment of this debt from the estate which its consideration has benefited. It is part of the duty of this court to prevent acknowledged wrongs and to protect acknowledged rights when courts of law are inadequate to give relief, and to apply the comprehensive and expansive power of equitable principles to meet new exigencies as they arise, that the great principle of law and justice may be practically vindicated, in permitting no wrong to be without a remedy, and no injury to go unredressed

The point that two causes of action have been improperly joined, is not well taken.

The complaint is designed as a bill in equity to reach the property of the wife, and the husband was a proper party. Some of the allegations in it may be unnecessary, and too much may be asked in the prayer for relief; but enough is stated to constitute a good cause of action for equitable relief, and the rest may be disregarded as surplusage.

The order of the special term should be reversed, and the demurrers overruled, with leave to the defendants to answer on payment of costs.

WELLES, J. The argument of the appeal in this case was heard at the general term, held in March last. At that time my impressions were strongly in favor of the appellant. The case was held over for consideration until the following June term; when, finding my brethren unable to agree, and in view of the importance of the question involved, it was again held over at my request, to give opportunity on my part for further examination. Since then I have given the subject as thorough an investigation as I am capable of doing; which has confirmed my first impressions, and led to an entire conviction of the soundness of the views contained in the preceding opinion of my brother SMITH.

I agree with the justice who decided the case at special term, that a legal title to property in a *feme covert*, held by her un-

der the acts of 1848 and 1849, is not such a *separate estate* as the courts of equity had recognized and acted upon. Such separate estate was a provision for the wife's separate use and benefit, independent of her husband, in which he had no interest, over which he had no right of control, which was usually, though not necessarily or invariably, held by her trustee, and which she disposed of by way of appointment. She could not, at common law, hold the legal title to property, either personal or real, for the reason that during her state of coverture she and her husband were considered one person, and her identity, so far at least as the right to hold property was involved, was lost or merged in him. Hence, there was no way at law in which such separate estate of the wife could be reached to satisfy demands upon it, however equitable and just; and although they may have been created by her for her individual benefit and upon the credit of her separate estate. (2 *Story's Eq. Jur.* §§ 1366, 1367, 1368.) To prevent the great injustice which might otherwise arise, and inasmuch as the wife's creditors had not the means at law of compelling payment of her debts which she had contracted to pay out of her separate estate, courts of equity undertook to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they could be satisfied. (2 *Spence's Hist. of Eq. Jur. of Ch.* 324.)

The only difference between the separate estate of a married woman, as recognized and acted upon by courts of equity for centuries, and their title to property acquired or held under the acts of 1848 and 1849, is, that the former is an equitable and the latter a legal estate or title. They are equally inaccessible at law to creditors, and there is quite as much necessity and reason for applying the doctrine in question to the latter as to the former. Unless it can be done, there is no way of reaching the property of a married woman, held by her under the statutes referred to. And I can perceive no objection to doing it. It is simply extending an ancient and well established principle of equitable jurisprudence to a case clearly within the spirit of the principle.

It cannot be doubted, it seems to me, that if the rights, legal capacities and privileges of married women had been the same at common law as the statutes in question have made them, the rule in equity respecting the liability of their separate estates would have originally been made applicable to them both, in common. A case or state of things is brought into existence by the legislature clearly within the reason and necessity of the principle, and which, I entertain no doubt, should be made subject to its power and action. The question is so well and fully examined by Mr. Justice SMITH, that I deem any particular discussion of it in this place unnecessary. I am, therefore, in favor of reversing the judgment of the special term.

T. R. STRONG, J., dissented.

Judgment reversed.

[MONROE GENERAL TERM, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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48a 537

CADY and wife *vs.* E. ALLEN and E. W. ALLEN.

Where a vendor, at the time of making a contract for the sale of land, agrees verbally to give the purchaser security for the payment of a judgment which is a lien upon the premises, but that stipulation is not inserted in the written agreement, and subsequently third persons, as sureties of the vendor, in fulfillment of the verbal undertaking, execute an instrument by which they agree to pay the judgment, such instrument will be held to be given upon a sufficient consideration; it being supported by the consideration of the principal agreement.

Where a complaint alleges that a judgment was recovered, and that it was a lien and incumbrance upon a lot, this will be considered as embracing the fact of the *docketing* of the judgment, and its legal effect.

Yet, if necessary, in such a case, the complaint may be amended on the trial, by the insertion of an allegation in due form of the docketing of the judgment; and the court will permit this to be done, upon appeal, as of the time when the complaint was prepared, without terms.

Where a vendor agrees to pay all claims against the lot sold, it is not necessary

for the purchaser to prove that a judgment which is a lien upon the premises has been enforced, or that he has been evicted. The fact of non-payment of the judgment is all that is necessary in order to show a breach; and the rule of damages, upon a breach, is the amount of the judgment, with interest.

Where the evidence in regard to a matter set up by the defendant as a set-off is conflicting, and it appears, upon a fair construction of the report of the referee, that he has found against its existence, his decision on that question cannot be disturbed.

APPEAL, by the defendants, from a judgment entered upon the report of a referee. The complaint alleged that on the third day of February, 1849, at South Bristol, in the county of Ontario, the defendants made and executed and delivered to one John Van Buskirk a certain instrument in writing, bearing date on that day, in the words and figures following: "South Bristol, Feb. 3d, 1849. Mr. John Van Buskirk, Sir: We do agree, for value received, to pay all claims against the house and lot that you bought of E. E. Lewis, deeded to him by Milo Gallaway and wife, that was against it at the time of the transfer, the said lot lying and being in the village of Newark, Wayne county, N. Y., and we hereby acknowledge the receipt of a certain lot, this day deeded by you to Milo W. Chase, and a certain buggy wagon, upon the above purchase, as assignees of E. E. Lewis.

ELI ALLEN,
ELI W. ALLEN."

That Ebenezer E. Lewis, the person mentioned in the said instrument, by deed bearing date the first day of December, 1848, for the consideration of eight hundred dollars, with covenant of warranty, conveyed to the said John Van Buskirk all that tract or parcel of land, situate, &c. [describing it] which parcel of land so conveyed was the lot mentioned and referred to in the said instrument in writing, and therein described as the house and lot bought of Lewis by Van Buskirk. That prior to the making of the said instrument in writing, and on the 4th day of July, 1848, one Daniel T. Young recovered a judgment in the supreme court, against the said Ebenezer E. Lewis and Erastus Shepard and James G. Reed, for the sum of sixty-three dollars and sixty-eight cents damages and costs, and that prior to the making of said instrument in writing, and on the seventh

day of August, 1848, Erastus Shephard and Silas K. Reed also recovered a judgment before D. Wentworth, a justice of the peace, against the said Ebenezer E. Lewis, for the sum of fifty-eight dollars and eighty-six cents damages and costs, both of which judgments were liens and incumbrances upon the said lot or parcel of land, at the time of the conveyance thereof as aforesaid, by the said Ebenezer E. Lewis to the said John Van Buskirk; and that the defendants have not paid the said two judgments, or either of them or any part thereof, although often requested to do so. And the plaintiff further alleged, that afterwards, and on the twenty-first day of July, 1849, the sheriff of the county of Wayne, by virtue of an execution upon the judgment first mentioned, to him directed and delivered, sold the said parcel of land pursuant to law, and the same was purchased at such sale by one William N. Cole, and that afterwards one George P. Metcalf, having acquired the right of the said William N. Cole, as such purchaser, the sheriff did by deed, bearing date on the eleventh day of June, 1852, convey the said parcel of land to the said George P. Metcalf, pursuant to the said sale, and to the statute in such case made and provided. And that the defendants, by means of the premises, became liable to pay to the said John Van Buskirk the sum of eight hundred dollars, with interest thereon from the first day of December, 1848. That the said John Van Buskirk, on the 8th day of July, 1852, by an instrument in writing duly subscribed by him, and for a good and valuable consideration, sold, assigned and transferred to the plaintiff the said instrument in writing, subscribed by the defendants and before set forth, whereby the plaintiff became entitled to demand and receive from the defendants the said sum of eight hundred dollars and interest. Wherefore the plaintiff prayed for judgment against the defendants for the said sum of eight hundred dollars, with interest thereon from the first day of December, 1848, besides costs.

The defendants, by their answer, denied the allegations in the complaint. They also alleged that the said Van Buskirk, on the first day of July, 1852, was and still is indebted to them for the services of the said E. E. Lewis, before then rendered

for the said Van Buskirk, and at his request, in the sum of one hundred dollars, and was and still is indebted to the defendants for goods, horses, wagons and other property sold to the said Van Buskirk by the said E. E. Lewis, and at his request, in the sum of two hundred dollars, which demands, before the said first of July, 1852, had been duly assigned by said Lewis to the defendants, and were and still are the property of the defendants. Also that the said John Van Buskirk was on the first of July 1852, and still is indebted to the defendants in the sum of five hundred dollars for work and labor done, goods sold and delivered, and materials furnished the said Van Buskirk, and at his request. Which several sums, or so much thereof as might be necessary, the defendants claimed to set-off against the demands of the plaintiff, and they asked for judgment in their favor for costs.

The cause was tried before a referee, who found the following facts: On the 1st day of December, 1848, one Ebenezer E. Lewis, by deed, conveyed to John Van Buskirk a house and lot in Wayne county, for the expressed consideration of $800. The house and lot had previously been conveyed to Lewis by Milo Gallaway and wife; Lewis' deed to Van Buskirk also contained a warranty against incumbrances. On the 4th of July, 1848, Daniel T. Young had recovered a judgment in the supreme court against Ebenezer E. Lewis, Erastus Shepard and James G. Reed for $51.10 damages, and $12.58 costs, upon a note made by Lewis and lent by him to Reed. This judgment was docketed in the office of the clerk of Wayne county on the 13th of November, 1848, and was a lien on the above house and lot at the time of the above conveyance from Lewis to Van Buskirk. Upon this judgment execution was issued to the sheriff of the county of Wayne, with directions indorsed thereon to collect the same of Ebenezer E. Lewis alone. The sheriff, under that execution, sold the above house and lot for $10, on the 21st of July, 1849, and executed and filed the usual certificate to the purchaser, William N. Cole, on the 25th of July, 1849. Cole by an assignment dated July 28, 1849, and acknowledged June 11, 1852, assigned the certificate to James G. Reed, and Reed

by an assignment dated February 5, 1851, and acknowledged June 11, 1852, transferred the certificate to George B. Metcalf, and the sheriff of Wayne county, on the 11th of June, 1852, by a deed executed and acknowledged on that day, and recorded in the office of the clerk of Wayne county on the 19th of August, 1852, conveyed the said house and lot to Metcalf. On the 3d of February, 1849, the defendants executed to Van Buskirk the instrument set forth in the complaint. On the 3d of September, 1850, Van Buskirk executed a deed to Daniel E. Lewis of the above house and lot, for the expressed consideration of $750, and Daniel E. Lewis, on the 4th of November, 1851, executed to the plaintiff Jane B. Ely (then Jane B. Lewis) a deed for the same, for the expressed consideration of $556. These deeds are duly acknowledged and recorded. On the 8th of July, 1852, Van Buskirk executed to the plaintiff Jane B. Ely (then Jane B. Lewis) the following assignment of the above contract of the defendants: "For a good and valuable consideration, I do hereby sell, assign and transfer unto Jane B. Lewis, of the town of Penfield, in the county of Monroe, a certain agreement made and executed by Eli Allen and Eli W. Allen, dated February 3d, 1849, to me, and by which the said Eli and Eli W. Allen agreed to pay all claims against a certain house and lot in the village of Newark, Wayne county, N. Y., bought by me of E. E. Lewis.

Dated July 8, 1852. JOHN VAN BUSKIRK."

When the plaintiff rested his cause, the counsel for the defendants moved for a nonsuit on these grounds: First. That the complaint did not state facts sufficient to constitute a cause of action. Second. That the complaint alleged no eviction by virtue of the said judgments or either of them, and no payment of the same, or either of them, or any portion thereof. Third. That the plaintiff was not entitled by virtue of the assignment of the 8th of July, 1852, to maintain this action. Fourth. That the proof showed that Reed, the judgment debtor, paid the sheriff's bid to Cole, and that put an end to the title by the sheriff's sale. The motion was denied, and the defendants' counsel excepted to the decision.

The proof being closed, the cause was submitted to the ref

eree, and the counsel for the defendants, amongst others, made the following points: 1. There is no consideration to uphold the defendants' promise. Van Buskirk paid nothing but what he was bound by his agreement to pay for the deed and covenant of Lewis to him. 2. The defendants received the property as the assignees of Lewis. They are liable to account for it as such, to him and his creditors. They are not personally liable, and have only promised as assignees. 3. This being in the nature of a covenant against the incumbrances, and no payment of the judgment having been shown, and no eviction having taken place, only nominal damages can be recovered. 4. The complaint does not show either an eviction or judgment, and without one or the other there can be no recovery in the case. 5. There having been no service of process in the attachment case, and being no affidavit or bond, the judgment is no lien on the real estate of the debtor, and is void. 6. The execution upon the other judgment having been issued against the personal property of Lewis alone, when all were personally served with process, was irregularly enforced against his real estate. 7. The set-off or counter-claim is well proved, Lewis' evidence is explicit, his recollection of dates and times distinct, and is not met or overcome by the wholesale evidence and imperfect recollection of Van Buskirk. 8. The sale having been made for $10, gave the plaintiff, who had become the owner, a vested right to redeem, by paying that sum and interest. It was her own folly if she allowed title to be perfected under the sale. She should have redeemed, or called on the defendants to do so, and can in no event recover beyond the sum which would have saved her title. 9. The assignment gave the plaintiff no right of action upon the agreement. Each of these points was overruled by the referee, except the 5th.

The proof did not satisfy the referee that there was any set-off which should be allowed. His conclusion of law was that the defendants were liable, on their contract, to pay the amount of the claim or incumbrance on said land, but that their liability extended no further than to pay the amount of such claim. And that the plaintiff was therefore entitled to judgment for

the amount of such incumbrance, $63.68, and the interest thereon from July 4, 1848, the time of its rendering, to the date of the report, which was $30.46, amounting in all to the sum of $94.14.

James C. Smith, for the appellants.

S. Mathews, for the plaintiffs.

By the Court, T. R. Strong, J. It appears by the testimony of Lewis, who had, prior to the making of the contract upon which the action is founded, given a deed to Van Buskirk for the lot mentioned in the contract, with a covenant of warranty, that he drew the contract, and that it was executed by the defendants, who were his general assignees in trust for the payment of his debts, at his request, without any benefit to themselves personally; that previous thereto Van Buskirk had made a claim upon him that he was bound to pay the judgment against the lot; and Van Buskirk testified that Lewis was to give him security for the payment of the judgment, although it was not in the written agreement in pursuance of which the deed was given. The fair conclusion from this is, that the contract in question was given in fulfillment of a verbal undertaking of Lewis, at the time of the making of the written agreement for the sale and purchase of the lot, that he would secure the payment of the judgment; and that the defendants executed it as his sureties. In this view there is no difficulty in respect to the consideration of the contract; it is supported by the consideration of the principal agreement.

The objection to evidence of the docketing of the judgment, that the fact is not alleged in the complaint, was properly overruled. The allegation in the complaint, on that subject, is that the judgment was a lien and incumbrance on the lot. This, following a statement of the recovery of the judgment, must be considered as embracing the fact of the docketing of the judgment and its legal effect. Especially will this be done, viewing the complaint with the liberality with which it should be

regarded at the trial. The defendant must have so understood it; it cannot be pretended that the offer of the proof was any surprise upon him; and it would be sacrificing substantial justice to the merest form to give effect to the objection made. If necessary, the complaint might have been amended on the trial by inserting the allegation in due form of the docketing of the judgment; and the court would now permit it to be done as of the time the complaint was prepared, without terms. I do not perceive that the allegation is more obnoxious to objection than an allegation of ownership of or title to property, or similar allegations of a mixed character containing law and fact, good even on demurrer, both before and since the code.

The contract being to pay all claims against the lot, it was not necessary for the plaintiff to prove that the judgment had been enforced, or that he had been evicted; the fact of non-payment of the judgment was all that was necessary in respect to a breach, and the rule of damages upon a breach was the amount of the judgment with interest. (*Port* v. *Jackson*, 17 *John.* 239, 479. *In the matter of Negus*, 7 *Wend.* 499.) This answers the objection to the amount of the recovery, that the land was sold under the judgment for much less than the amount due, and that Van Buskirk might have redeemed and sold the title for less than the plaintiff recovered. Van Buskirk was under no obligation to the defendants to redeem, but upon their omission to pay, was entitled to recover of them the amount of the judgment.

Assuming that Lewis, as surety of Reed in the judgment, had, upon Reed's taking an assignment of the sheriff's certificate and while he held it, an equitable claim that Reed release to him all his right to the lot under the sale, it is by no means clear that he had such an equity against Metcalf, who subsequently took an assignment of the certificate from Reed and a deed from the sheriff pursuant to the sale and assignments. It does not appear that Metcalf is not a bona fide purchaser without notice of the equity against Reed; nor is it certain that Van Buskirk, and those claiming title to the lot under him, could avail themselves of that equity. It should be

entirely clear that the facts constitute an equitable payment of the judgment, available to those persons, to operate as a defense to this action. But it is sufficient to say, in respect to this part of the case, that no question in relation to it is presented by the pleadings. It should have been set forth by the defendants specially in their answer if they designed to rely on it.

The evidence in regard to the indebtedness alleged by the defendant as a set-off, is conflicting; and I think, upon a fair construction of the report of the referee, he has found against its existence. His decision on that question, as the evidence stands, cannot be disturbed.

It follows that the judgment must be affirmed.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Williams and wife *vs.* Holdredge.

22 396
51h 186

To say of a married woman that she has the venereal disease; that she has the clap; that she has the pox, is actionable *per se*, without proof of special damage, and therefore she may unite with her husband in an action for the slander. Gray, J., dissented.

THIS was an appeal from a decision made at a special term, overruling a demurrer to the complaint. The opinion below states the facts.

By the Court, Mason, J. This is an action of slander for words spoken by the defendant of and concerning Eliza Williams, the wife of the plaintiff Sherman Williams. The complaint alleges that the defendant stated of and concerning Mrs. Williams, that she had the venereal disease; that she had the clap; that she had the pox. The case comes before the court on a demurrer to the complaint, assigning as causes of demurrer, first, misjoinder of Mrs. Williams as a party plaintiff; and

secondly that the complaint does not state facts sufficient to constitute a cause of action. The rule is well settled, that when words spoken of the wife are only actionable on proof of special damage, the husband must sue alone. (*Starkie on Slander*, 157, 159. 1 *Lev.* 14. 1 *Chitty's Plead.* 63, 4*th ed.* 1 *Salk.* 119, *note b.* 18 *John.* 443. 2 *Kent's Com.* 180, 4*th ed.* *Beach and wife* v. *Ranney and wife*, 2 *Hill*, 309, 316.) This action, therefore, cannot be maintained in the name of the husband and wife, if it shall be held that the words charged in the complaint are not actionable *per se.* The rule is well settled, both in England and this state, that an action does not lie for calling a woman a whore, without proof of special damage. (1 *Rolle's Abr.* 34, 36. 1 *Lev.* 134. 2 *Ld. Ray.* 1004. *Bacon's Abr. tit. Slander, B.* 6. 5 *Mod. R.* 104. 5 *Mees. & W.* 249. 2 *Ad. & El.* 2. 2 *John.* 115. 5 *id.* 188. 6 *Cowen*, 76. 13 *John.* 126, 275. 13 *Wend.* 253.) It seems, however, that to say of a woman she is a whore, in the city of London, is actionable upon the custom of London, by reason of the custom there to cart whores. (*Robertson* v. *Powell*, 2 *Selwin's N. P.* 1224. *Bacon's Abr. tit. Slander, B.* 6. *Doug.* 380. 4 *Burr.* 2032, 2418.)

It seems, however, that this custom has never been proved, so as to maintain an action in Westminster Hall. In the city courts the action is maintained because they take notice of their own customs, without proof. (*Doug.* 380. 4 *Burr.* 2032. 9 *Bacon's Abr.* 41, *Bouv. ed.*) But to maintain the action upon the custom of London, the words must charge that the female was a whore in London, as it is not sufficient if the declaration merely allege that she resided there. (2 *Selwin's N. P.* 1224.) The law is well settled in England, and has been from the earliest periods of the jurisprudence of that country, that it is actionable to say of a woman that she has the pox. (1 *Rolle's Abr.* 43, 44, 66, 67, 420. 1 *Sid.* 50. 2 *Cro.* 430. 1 *Lev.* 205. *Comyn's Dig. tit. Action on the Case for Defamation, D.* 29. 1 *Bacon's Abr.* 384, *tit. Slander, B.* 2, *vol.* 9, *p.* 45, *Bouv. ed.* *Cro. Jac.* 144. *Whitfield* v. *Powell*, 12 *Mod. R.* 248. *Hob.* 219. 1 *Ld. Ray.* 710. *Clifton* v. *Wells*, 12 *Mod.*

633. 2 *Sid.* 4, 36. 14 *Petersd. Abr.* 691, *note.* *Bloodworth* v. *Gray*, 7 *Man. & Gr.* 334. *Starkie on Slander*, 10, 1217. 2 *Leigh's N. P.* 1350.) The rule which declares such words actionable is a reasonable one. Man being formed for society, and standing in almost constant need of the advice, comfort and assistance of his fellow creatures, it is highly reasonable that any words which import the charge of having a contagious distemper should be in themselves actionable, because all prudent persons will avoid the company of a person having such distemper. It makes no difference whether the disease be owing to the visitation of God, to accident or to the indiscretion of the party therewith afflicted, for in every one of the cases the being avoided, from which the damage arises, is the consequence, and upon this the action is predicated. (9 *Bacon's Abr.* 45, *tit. Slander, B.* 2.) It is equally actionable to say of a person he has the leprosy. (*Cro. Jac.* 144. 1 *Rolle's Abr.* 44. 9 *Bac. Abr.* 45.) But charging another with having had a contagious disorder, as the pox, is not actionable, unless the words impute a continuance of the disorder at the time of the speaking them. The very gist of the action fails in such a case, for such a charge cannot produce the effect which makes it the subject of an action, namely, exclusion from society. (*Taylor* v. *Hall*, 2 *Str.* 1389. *Carslope* v. *Mapledorain*, 2 *T. R.* 471. 5 *Bac. Abr.* 45.) I have not been able to find any adjudged case in this state where the question, whether such words are actionable *per se* or not, has ever been adjudged; at least no reported case is to be found where the question has been determined. The English rule is affirmed, however, in a note to *Hopkins* v. *Beedle*, (1 *Caines*, 348.) Such a charge has been held actionable in several states of the union, and is declared in the elementary books to be an exception to the rule that the words must contain an imputation of some criminal offense for which corporal punishment may be inflicted. (7 *Conn. R.* 260. 13 *Mass. R.* 252.) In the latter case the court say that words imputing some foul and loathsome disease which would expose the person charged to the loss of his social pleasures, are action able without special damage. And so in the case of *Watson*

v. *McCarthy*, (2 *Kelly*, 57,) it was held that words charging a person that he has the gonorrhœa, are actionable in themselves. (*See Starkie on Slander*, 10, 12, 17. 2 *Leigh's N. P.* 1350.) I think we have shown that such words are actionable in themselves, both upon principle and authority; and I see no reason why we should not so hold the law with us, unless it be that some strong expressions in the opinions of some of the judges in this state, defining the class of words which are actionable, might seem to militate against it. It has been thus said, in many cases, that words, to be actionable in themselves, must contain an express imputation of some criminal offense for which corporal punishment may be inflicted; and yet there are several well recognized exceptions to this rule. Thus, to say of a merchant he is a cheat and keeps dishonest books, is actionable; and so to say of an attorney that he is a dishonest scamp and defrauds his clients, or of a physician that he is an ignoramus, and injures more than he cures. The rule is stated in the cases relied upon by the counsel for the defendant, without undertaking to specify the exceptions, as they were not needful to the decision of the cases before the court. I am entirely satisfied that this complaint states sufficient facts to constitute a cause of action, for the reason that these words are actionable *per se*, and being so, Mrs. Williams was properly made plaintiff in the action. The court were right in overruling this demurrer, and the judgment should be affirmed.

Crippen, J., and Shankland, J., concurred.

Gray, J., dissented.

Judgment affirmed.

[Delaware General Term, July 11, 1854. *Crippen, Shankland, Gray* and *Mason*, Justices.]

KEELER *vs.* FROST and WORDEN.

22 400
7h 649
30h 210
46a 383
76a 323

Where the assessment of a school tax was made by two trustees, in the absence of the third, after which the two made out and signed a warrant for the collection of the tax, which was then carried by one of them to the third trustee, who also signed it; *Held* that the assessment was void, and that the trustees were trespassers in issuing the warrant and seizing and selling property upon it.

One of three trustees cannot delegate his authority to the other two, to make an assessment or apportionment. Neither can he, after they have made it, ratify and adopt the assessment by indorsing his approval, in the absence of the others.

APPEAL from the judgment of a county court, reversing the judgment of a justice. The assessment of a school tax was made by two trustees, the third trustee not being present. After the two had made the assessment, and made out the warrant and signed it, the warrant was carried by one of them to the third trustee, and he signed it. The plaintiff's property being seized and sold upon the warrant thus issued, he brought an action against two of the trustees for the trespass. He recovered a judgment before the justice, which was reversed on appeal to the county court.

By the Court, MASON, J. The county court erred in holding this a valid assessment. It was made by two of the trustees, the third not meeting with them and not being notified. The statute requires the trustees to apportion the tax. (*Laws of* 1847, *ch.* 480, *p.* 701, § 85.) The common law doctrine is, that when a power, authority or duty is confided by law to three or more persons, or whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, authority or duty may be exercised and performed, by a majority of such persons or officers, upon a meeting of all the persons or officers so intrusted or empowered, unless special provision is otherwise made. (4 *Denio*, 125. 21 *Wend.* 211. 23 *id.* 324. 7 *Cowen*, 526. 1 *id.* 238. 3 *Denio*, 252, 253. 1 *Bos. & Pul.* 236. 3 *T. R.* 592. 6 *John.* 41. 7 *Cowen*, 526.) This rule of the common law has, in this state, become the statute law. (2 *R. S.* 555,

§ 27.) Where nothing is shown to the contrary, it will be presumed that all the trustees met and consulted in doing the act. (17 *John.* 461, 468. 9 *Wend.* 17. 21 *id.* 178. 3 *Denio*, 253.) In the case under consideration, it is expressly shown that Worden did not meet with the other two trustees when the apportionment and assessment of this tax was made. Nor was he notified of their meeting for that purpose. The fact, if admitted, that he signed the warrant, does not relieve the case in any respect. The statute and common law both require the apportionment to be made upon the joint consultation of all the trustees, and not that the warrant shall be signed by all. (*Fulsom* v. *Streeter*, 24 *Wend.* 270. *Douning* v. *Ruger*, 21 *id.* 182. 9 *id.* 19. 17 *John.* 461. 23 *Wend.* 324.) The county court seems to have placed the case upon the distinct ground that, as Worden's name was afterwards signed to the warrant, this must be deemed an approval and ratification of the apportionment made by the other two. The error which the county court committed in this respect, consists in applying the rule of principal and agent to these officers. Worden could not delegate his authority to the other two trustees to make the assessment. Neither could he, after they had made it, ratify and adopt the assessment or apportionment by indorsing his approval, in the absence of the others. The authority which the trustees are required to administer, in apportioning this tax, involves the exercise of judgment and discretion—a power which cannot be delegated. (*Powell* v. *Tuttle*, 3 *Comst.* 396.)

It follows, therefore, that this assessment was wholly illegal, and the defendants were in fact trespassers in issuing their warrant and seizing and selling the plaintiff's property. The judgment of the county court must be reversed, and that of the justice affirmed.

[Delaware General Term, July 8, 1856. *Gray*, *Shankland* and *Mason*, Justices.]

The Trustees of the Village of Elmira *vs.* Dunn.

Where the charter of a village authorized the trustees to raise money by tax, to be assessed on the estates, real and personal, within the corporation, and collected from the several owners thereof, to pay the contingent and other expenses of the corporation, and the trustees imposed and assessed taxes against the defendant on certain premises of which the corporation had given a lease to another for 990 years, for $400 in hand paid, and for the annual rent of three pepper corns if demanded, of which premises the defendant was in possession, having acquired the interest of the lessee therein; *Held*, that the premises were rightfully taxed to the defendant as real estate of which he was the owner.

THE reporter has not been furnished with any papers in this case, from which to prepare a statement of the facts. It is believed, however, that the opinion of the court states all the particulars necessary to an understanding of the decision

E. P. Hart, for the plaintiffs.

J. Dunn, for the defendant.

By the Court, Mason, J. The second section of title five of the charter of the village of Elmira, (*Laws of* 1850, *p.* 324,) authorizes the trustees of said village to raise money by tax to be assessed on the estates, real and personal, within the corporation, and collected from the several owners thereof, &c. to pay contingent and other expenses of the corporation, &c. In 1854 and 1855 the trustees of said village imposed and assessed taxes against the defendant on certain premises of which the plaintiffs had given a lease for 990 years, for $400 in hand paid, and for the annual rent of three pepper corns if demanded. The defendant had acquired the interest of the lessee, and was in possession of the premises. The question presented for our adjudication is, whether the defendant is liable to be taxed for these premises under this charter. I think he is. The tax is to be assessed on the estates, real and personal, within the corporation, and to be collected from the several owners. Under

our revised statutes the interest of a lessee in such a case is regarded as an estate in land. (1 *R. S.* 722, §§ 1, 5.) A judgment against the lessee becomes a lien and charge upon such estate as real estate, and the same may be sold, the same as real estate. (2 *R. S.* 359, § 3. 7 *Wendell*, 468.) And that such a lessee might redeem the same from a prior mortgage, given by the lessee, was expressly held in *Averill* v. *Taylor*, (4 *Selden*, 44.) Such estates take their place under our statutes as estates in lands. (1 *R. S.* 722, § 1. *Id.* 750, § 10. *Id.* 762, § 36.) And such is the view taken in the prevailing opinion in *Averill* v. *Taylor*, (4 *Selden*, 52.) It is true that they had been so long treated as personal property that the legislature, for the purpose of preserving a rule of property in regard to personal representatives and the creditors of deceased persons, (2 *R. S.* 82, § 6,) have provided that leases for years shall go to the administrators and be distributed as personal property. They went there at common law; but after the legislature had given to such estates the dignity and importance of real estate, and had expressly declared that they should be embraced in the term lands, and had given them a place in the division of estates in lands, declaring them to be subject to the lien of judgments and of sales on execution, the same as real estate, there was a necessity that they should provide by express enactment that they should go to the executors or administrators, and be distributed as personal property; otherwise they would have descended as real estate to the heir at law. If I am right in the views above expressed, it follows that these premises were rightfully taxed to the defendant as real estate of which he was the owner. It does not alter the positive character which our statutes declare shall be given to such a leasehold interest in the hands of the lessee or the owner of the term, that for the single purpose of the statute of distributions they have seen fit to place it with the personal property of the deceased, and give it the same direction. The 6th section of title 5, chap. 13 of 1 *R. S.* 419, has no application to the case; for the reason that

the defendant is the person who ought to pay the tax, as it was property assessed to him. I concur in the judgment advised by my brother SHANKLAND.

Judgment for the plaintiffs.

[DELAWARE GENERAL TERM, July 8, 1856. *Shankland*, *Gray* and *Mason*, Justices.]

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22 404
45 475
53 567
41k 411

THE PEOPLE, *ex rel.* Edwards W. Fiske, *vs.* THE COMMON COUNCIL OF THE CITY OF BROOKLYN and THE COMMISSIONERS for widening *Fulton street.*

The common council of the city of Brooklyn adopted the following resolution: "Whereas, that part of Fulton street opposite the City Hall is very narrow, and the present is the best opportunity the city may have for some time to widen said street, therefore, Resolved, that the matter of widening said street be referred to the street committee." That committee reported in favor of the measure, and recommended that an application should be made to the legislature for leave to make the improvement. Application was accordingly made, and an act was passed by the legislature, on the 17th of April, 1854, entitled "An act to widen Fulton street, between Red Hook Lane and Court street, in the city of Brooklyn," and providing that "Fulton street, between Red Hook Lane and Court street, *is hereby widened* as follows." The second section provides that the common council *may* apply to the county court, or to the supreme court, at a special term, for the appointment of commissioners of estimate and assessment, &c. Subsequently the common council adopted a resolution directing the city counsel forthwith, upon the receipt of "the act *widening* Fulton street," to take the necessary and legal measures *to carry out the provisions of the law for that purpose.* The city counsel accordingly applied to the county court for, and procured the appointment of, three commissioners of estimate and assessment. *Held*, that the statute was peremptory upon the common council to pursue the designed improvement to its consummation; and that upon the refusal of the common council to proceed with such improvement, a *mandamus* would lie.

Held also, that an order made by the supreme court, at a special term, authorizing the common council to discontinue proceedings for widening the street, was not for either of the purposes for which alone that court could act, and was therefore void, for the want of jurisdiction in the court to grant it.

Held further, that the provision in the 2d section of the statute, that the common council "may" cause application to be made for the appointment of

commissioners, did not leave it optional with the common council whether to proceed or not, nor indicate that the project had not been conclusively adopted, and its completion peremptorily ordered, by the legislature.

The word "shall" may be substituted for "may" in the interpretation of a statute, when the good sense of the entire enactment requires the change.

This rule applies when a statute establishes an improvement, and devolves upon any person or persons, or a corporation, the performance of such acts as may be requisite to insure its completion.

THIS was an application for a peremptory mandamus to compel the defendants to proceed in the matter of the widening of Fulton street in the city of Brooklyn, and to complete the same. The facts are fully stated in the opinion of the court.

H. C. Murphy, for the relator. I. The duty of the common council is prescribed by the special act widening Fulton street, passed April 17, 1854. (*Sess. Laws of* 1854, *p.* 781.) By that statute no discretion is vested in the common council as to whether the street shall or shall not be widened. The corporation asked, and the legislature granted, a law widening the street *ipso facto;* thus absolutely divesting the owners of the land of the right to use the property required for the street. The providing compensation was therefore the only duty of the common council. The act is mandatory upon them for that purpose.

II. When there is no discretion vested in the corporation as to the propriety or impropriety of the improvement, and the legislature has directly exercised the right of taking private property for public use, the assumption by the corporation of a right to withhold the compensation would nullify the law, which cannot be supposed.

III. The cases in the books have arisen in proceedings where the corporation had the right to determine, themselves, as to the propriety of the improvement. (*See The People* v. *Corporation of Brooklyn*, 1 *Wend.* 321.) The court, following the act of April 3, 1827, say, "The trustees are *authorized, but not compelled*, to lay out and make such new streets as they shall think necessary."

IV. Even in the proceedings over which the common council have the whole control, the relator, as a tax payer and resident representing the public and having a public interest in the performance of the law, is entitled to compel the corporation to go on. (*Martin* v. *Mayor &c.*, 1 *Hill*, 545.)

V. The order of discontinuance in the supreme court was *coram non judice.* No proceedings were ever had in that court, and none could be had except as provided by the statute. The commissioners were appointed by the county court.

VI. The common council, in refusing to perform the law, do not profess to act for the public good; (*see report of assessment committee;*) but, having an interest as proprietors in the land assessed, seek to exercise their power for their private benefit as a corporation. They should have made their objections to the report of the commissioners, like any other owner not satisfied with it. (*See Laws of* 1850, *p.* 268, § 12.)

R. C. Brainard, for the defendants. I. The order of discontinuance of proceedings, made by the supreme court at special term, is a fatal objection to the application for a mandamus, until said order is vacated on appeal; the supreme court having full jurisdiction over the subject matter. (*In the matter of Dover street*, 18 *John.* 506.)

II. The statute authorizing the improvement is not peremptory, but gives the common council discretionary power to make the said improvement or not, as may to them seem best. Neither the spirit nor the letter of the act requires that the words occurring in the second section of said statute, to wit: "The common council may make application to the county court, &c. for the appointment of commissioners of estimate and assessment," should be construed to mean *shall* make application, &c. (*See People* v. *Lambier*, 5 *Denio*, 9; *also The Newburgh Turnpike Co.* v. *Miller*, 5 *John. Chan.* 101.)

III. The common council, having a discretion in the matter, had the right to discontinue the proceedings, of its own motion, as it did, before the confirmation of the commissioners' report; and more especially was the discontinuance regular, when made

by leave of the court. (*See Hawkins* v. *The Trustees of Rochester*, 1 *Wend.* 53. *In the matter of Dover street*, 18 *John.* 506. *In the matter of Beekman street*, 20 *id.* 269.)

IV. It never was the intention of the common council to discontinue proceedings, except for the purpose of commencing proceedings *de novo*, as they have done. There can be no valid objection to a discontinuance for such a purpose on account of irregularities. New commissioners have since been appointed and commenced their duties.

S. B. Strong, J. The common council of the city of Brooklyn, on the 19th of January, 1854, and shortly after a fire which had consumed all the buildings on the easterly side of Fulton street, opposite the city hall, adopted a resolution in the following words: "Whereas, that part of Fulton street opposite the city hall is very narrow, and the present is the best opportunity the city may have for some time to widen said street, therefore, resolved, that the matter of widening said street be referred to the street committee." That committee, on the 24th of the following February, reported that they had examined the matter thus referred to them, and were of opinion that public convenience required the suggested improvement, and that then was a very desirable time to effect it, and they therefore recommended that an act should be prepared and forwarded to the legislature, authorizing the common council to have Fulton street widened, agreeably to the red lines on an accompanying diagram. The common council adopted the recommendation, and it was approved by the mayor on the 15th of the following month; and an application was subsequently made to the legislature, by the common council, for the passage of an act to widen Fulton street, according to the recommendation of the street committee. On the 17th of April following an act was passed by the legislature, entitled "An act to widen Fulton street between Red Hook lane and Court street, in the city of Brooklyn," and providing as follows: "Fulton street, between Red Hook lane and Court street, *is hereby widened* as follows:" and the act then proceeded to designate the new boundary lines.

agreeably to the diagram which had been presented to the common council by the street committee. The second section of the act provides that the common council *may* make application to the county court of the county of Kings, or to the supreme court at a special term held in that county, for the appointment of commissioners of estimate and assessment, and that the powers of the courts, and of the commissioners, should be the same as those provided by law in reference to commissioners in opening streets in that city; and the third section applies the provisions of law relative to opening streets *after the appointment* of the commissioners to the improvement thereby authorized, and directs that the same proceeding should be had thereafter in relation to such improvement, and the collection of the assessments therefor, as if the same were commenced under the existing law for the opening of streets in the said city. On the 24th of April, 1854, the common council adopted a resolution directing the city counsel forthwith, upon the receipt of "the act *widening* Fulton street," to take the necessary and legal measures *to carry out the provisions of the law for that purpose;* the city counsel accordingly applied to the county court for, and obtained, the appointment of, three commissioners of estimate and assessment. The commissioners, on the 15th of March, 1855, filed their report, and caused a notice to be duly published, that they would meet to review the same on the 28th of the same month. They accordingly met on that day at the office of the city counsel to review their report. No objections in writing were offered by or on behalf of the city; the committee then corrected their report, but did not file it in the office of the county clerk, nor present it to the court for confirmation in consequence of the action of the common council. On the 30th of the same month, the counsellor for the city sent a communication to the common council stating that he could not assume the responsibility, without further direction, of presenting the report for confirmation, in consequence of the heavy assessment of the city for benefits to the park and city hall, which would require a considerable increase of the taxes. This communication was referred to the committee on assessments.

That committee, on the 28th of September, 1855, reported to the common council, that inasmuch as the city hall park would be disfigured by the proposed measure, and the assessment for benefit to the city property had been too heavy, and to the property of some individuals too light, and the report would therefore have to be sent back to the commissioners and reconsidered by them, which would increase the expense of the improvement, they would recommend the adoption of a resolution that all proceedings in widening Fulton street, between Red Hook lane and Court street, be discontinued. Such resolution was accordingly adopted by the common council on the 15th of November, 1855. On the 4th of December following the city counsel applied to this court, at a special term held in the county of Kings, for, and obtained, an order (purporting) to authorize the common council to discontinue proceedings in the matter of widening Fulton street. Since then no further proceedings in the matter have been had.

The relator now applies, in his character of a citizen and tax payer of Brooklyn, for a mandamus requiring the common council of the city, and the commissioners, to pursue the usual measures, subsequent to what has been done, to effectuate the completion of the improvement.

The counsel for the city contended, on the argument, that the order of discontinuance, made at the special term of this court, presents at present an effectual obstacle to the application, and must continue to do so until removed (if it should be removed) on appeal. That would be so if this court had jurisdiction of the matter when the order was made; but there had not been at that time any proceeding on that subject in this court. The application for the appointment of commissioners had been made to the county court. The delegation of the power to act by either that court or the supreme court, at special term, was limited to two purposes: the appointment of commissioners, and the confirmation (or return for correction) of their report when duly presented. (*Act of April* 4, 1850, *tit.* 4, §§ 12, 13. *Laws of that year, pp.* 269, 270. *Act of April* 17, 1854, *to widen Fulton street*, §§ 2, 3.) No other power was delegated to, nor any

general jurisdiction conferred upon, either tribunal. The matter could not properly come before either for any other purpose, nor at any time, except when proceedings were had in reference to the designated objects; it had not been before this court at all until the application for the order was made; that order was not for either of the purposes for which alone this court could act, and therefore it had no jurisdiction to grant it, and such order was consequently void; and as the objection of want of jurisdiction can be raised at any time, when directly or even collaterally involved, it is not in the plaintiff's way. The proceedings to obtain the order are not set forth in any of the papers presented to me by either party on this application; it does not appear that any notice of the motion to obtain the order had been served on any one, or published; probably the motion was unopposed, and the attention of the judge was not particularly directed to the question of jurisdiction. The motions at the special terms in Brooklyn are so numerous that the judges can neither peruse nor indeed hear all the papers presented on ex parte applications, and they must therefore rely upon the statements made by the counsel; these are generally accurate as far as they go, but sometimes there are omissions of facts which the counsel do not, but which the judge might, deem material. This hasty and certainly imperfect action is the necessary result of the pressure of business, and the present defective, and, I must add, unconstitutional arrangement of our judicial districts. There was considerable discussion at the bar as to the weight of the reasons assigned by the committee on assessments, and adopted by the common council, for the proposed abandonment of the improvement; they seem to be rather weak, and were apparently designed more as an excuse than a justification. The question as to the alleged disfigurement of the park was properly before the common council, and as they held their sessions in the city hall, which is in its midst, must necessarily have been considered by its members when their primary resolution was adopted; if it would have been as considerable as is now averred, it could not have been overlooked; then was the appropriate time for the considera-

tion of that objection if it had any foundation, and it should not have been deferred until after the resolution had been adopted by the common council, and at their instance by the legislature, and consequent expensive proceedings been had, and no doubt numerous business arrangements made, on the supposition that the projected improvement would be consummated.

There is nothing before me to show that the objection is well founded, and my own examination of the ground, if it is proper to allude to that, has led me to the conclusion that the exclusion of the small part of it which the proposed measure would require, would neither mar its shape nor impair its usefulness. If, as the common council alleges, the park has been assessed at too high a rate, the statutes provide an adequate remedy; they should have made the objection before the commissioners at the time appointed to review their assessments, and when they met in the office of the city counsel. If they had done that, and presented for the consideration of the commissioners a statement of the facts and considerations upon which they relied, no doubt full justice would have been done, especially as the subject was familiar to one of the commissioners, from his professional and official engagements at the city hall. If they had failed before the commissioners, they could still have appealed to the county court, or to a judge of this court, when the report should be presented for confirmation. Having neglected to present their objections to the commissioners, and to adopt the ordinary measures for redress prescribed by the statute, they ought not now to be permitted to resort to the extraordinary remedy of abandonment. If, however, they had made the usual statutory efforts to procure redress and failed, and they had ascertained that the expense to the corporation would have been beyond any benefit which the completion of the proposed measure would have conferred, they might still have discontinued proceedings if the final adoption of the contemplated improvement had been left to their discretion.

On examining the statute relative to widening Fulton street

it seems to me that it fully adopts the project, and in effect commands its consummation. Its title is, "An act to *widen* Fulton street," not to permit the common council to do it; the first section provides that such street is thereby widened, as therein designated, not that it might thereafter be done. The statute operated *proprio vigore* to change the legal boundaries of the street; such is the plain, obvious and only import of its language; there is no permission given to alter the boundaries, nor is it, nor can it be, supposed that the common council could do that; they were fixed, so too was the entire measure. It was *un fait accomplé.* Nor is any different intent indicated by the word "authorized," which is twice used in the third section to designate the improvement. The first definition of the verb "to authorize," given by Dr. Worcester in his valuable dictionary, is "to establish by authority," and as that harmonizes with the positive terms used in the title and the first section of the statute, it is no doubt the sense in which it was used by the legislature. It was contended at the bar that the provision in the second section, that the common council may cause application to be made for the appointment of commissioners to estimate and assess the expenses and damages and benefit of the improvement, left it optional with the common council whether to proceed or not, and indicated that the project had not been conclusively adopted and its completion peremptorily ordered by the legislature.

But it is a familiar rule that the word "shall" may be substituted for "may," in the interpretation of a statute, when the good sense of the entire enactment would require the change and the rule applies when, as in this case, the statute establishes an improvement, and devolves upon any person or persons, or a corporation, the performance of such acts as may be requisite to insure its completion. The legislature would not decree the end without making effectual provision for the means. If the statute had simply devolved upon the common council a discretionary power to pursue or abandon the project, it would have been wholly superfluous, as that body had it before. (*Act*

of April 4, 1850, *tit.* 4, §§ 1, 2, 3.) There would have been merely a dispensation with the preliminary notice, and the designation of the district of assessment; if, indeed, either had been necessary where the only object was to widen the street, which is doubtful. When the language of a statute is susceptible of two interpretations, by one of which something substantial will be accomplished, and by the other little or nothing, the former should prevail. In that, common sense and law concur. It cannot be supposed that the common council would have applied to the legislature for, or that the legislature would have consented to pass, an act for the sole and insignificant purpose of dispensing with a preliminary notice for the brief period of twenty days. Something more must have been designed by both the municipal and legislative bodies, and that, so far as a judgment can be formed from the circumstances and the language used, must have been the conclusive adoption of the measure by the legislature. The common council may have been inclined to devolve the responsibility of the measure upon the higher power, or to give to it more efficiency than it might have acquired from municipal legislation. Although the power to make this improvement had been devolved upon the corporation by its charter, yet the question as to the right of the legislature to exert what had been previously delegated, could not be raised in this case, as the measure was adopted upon the resolution of the inferior body, and subsequently received its full assent.

From the examination which I have been able to give to this case, I am satisfied that the statute is peremptory upon the common council to pursue the designed improvement to its consummation, and as that body has arrested its progress midway, and declines to proceed any farther, a mandamus should be awarded against the common council; another may issue directed to the commissioners, but they should be exempted from the obligation to make any return, on signing a stipulation to abide by such judgment as may hereafter be

rendered against the common council, should that body elect to proceed any farther in this contest.

Ordered accordingly.

[KINGS SPECIAL TERM, September 1, 1856. *S. B. Strong*, Justice. Affirmed at a GENERAL TERM in KINGS COUNTY, October 14, 1856, held by *Brown* & *B. Strong* and *Birdsey*, Justices.]

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18a 163
37a 253

APOLLOS R. WETMORE, HOWELL HOPPOCK, R. L. STUART and A. STEWART *vs.* STORY, RADFORD and MURPHY.

When the charter of the city of New York, granted in 1830, declared that the legislative power of the corporation should be "vested in a Board of Aldermen and a Board of Assistants," who, together, should form the common council of the city, it must be considered as having adopted, by implication, so far as applicable, the universally recognized principles of *le islative* bodies, consisting of two independent branches.

Hence a resolution, adopted by the board of assistants, in one year, cannot be concurred in by the board of aldermen in another year, so as to make it, without consulting the existing board of assistants, an ordinance of the common council. It must, as in the case of unfinished business in other legislative bodies, be taken up *de novo*.

Accordingly *held* that the board of aldermen of the year 1853, could not take up, and pass, a resolution of the board of assistants of the year 1852, authorizing the construction of a rail road in the streets of the city, and give it effect as a law, without consulting the newly elected body.

Such a resolution, although passed by *a* board of aldermen and by a board of assistants, is not a resolution of the *common council*, and, as a consequence, was not confirmed by the act of the legislature, passed April 4, 1854, relative to the construction of rail roads in cities.

That act, in excepting from its operation rail roads already "constructed in part," meant those constructed under lawful authority, and not such as were made under grants, licenses, resolutions or contracts which had never been made, given, passed or entered into according to the charter, and which, therefore, having in judgment of law no existence, could not be confirmed.

A rail road constructed in the streets of the city of New York under and by virtue of a resolution adopted by the board of assistants, in one year, and concurred in by the board of aldermen in another year, having no warrant for its commencement, and none for its continuance, is not only a public nuisance, but a

public nuisance of which tax payers and owners of property on the streets through which the rails are laid have a legal right to complain, as specially injurious to them in their ingress and egress to and from their places of business.

Such a nuisance may be restrained by injunction, upon the application of the parties specially aggrieved.

But such parties are not entitled to any compensation, nor to an injunction, on the ground that no compensation has been awarded to them for the land in the streets, claimed by them; inasmuch as, even if they have any title to those lands, their property will not be used for any purpose other than to pursue previously acquired privileges.

An authorized rail road in a city is not, *per se*, a nuisance. When the principal act is sanctioned, that legalizes the temporary obstruction to the public, caused by the prosecution of the appropriate work, and would prevent any effectual action by individuals on account of any consequential injury—although it might be peculiar to them—which should necessarily result from it. But it is otherwise when the rail road is constructed without the requisite authority

Per S. B. Strong, J.

APPEAL by the plaintiffs from a judgment entered at a special term, dissolving an injunction. The complaint was filed by the plaintiffs, owners of property and tax payers, in the city of New York, to restrain the defendants from constructing a rail road (called the Ninth Avenue Rail Road) through Washington and Greenwich streets, under an alleged grant from the common council of the city, which the plaintiffs insisted was invalid. The injunction restrained the defendants "from entering into, or upon, Greenwich and Washington streets for the purpose of laying or establishing a rail road therein, and from digging up, or subverting, the soil, or doing any other act in those streets, tending to incumber them, or to prevent the free and common use thereof, as the same have been heretofore enjoyed." The defendants, in their answer insisted upon the validity of their grant, and the power of the common council to make it, and denied that the plaintiffs were the owners of the soil of the streets, but on the contrary alleged that the ownership thereof was vested in the corporation of the city. The cause was tried before Justice Cowles, at special term, without a jury. On the trial the defendants introduced and proved the

following resolutions of the common council, and relied upon them as their authority for constructing the rail road in question.

"*Resolved*, That the common council do hereby grant the right and privilege to James Murphy, William Radford and Miner C. Story, and their respective assigns, and to those they may associate with them, to construct a rail road from Fifty-first street to the Battery, and back, in and through the following streets, viz:

With a double track from Fifty-first street through the Ninth avenue to Gansevoort street, thence by a single track through Greenwich street to the Battery, and by a single track through Gansevoort street to Washington street, and through Washington street to the Battery, and through Battery place between Greenwich and Washington streets, to connect the said single tracks.

And also to run cars for the conveyance of passengers, &c. upon said road, each and every day, at such times as they may think proper, subject to provisions hereinafter named.

Provided, said rail road shall be constructed in all respects after the manner of the construction of the Eighth Avenue Rail Road; and,

Provided, that in no case steam power be used on any part of said rail road; and also,

Provided, that the said grantees shall begin the construction of said road on or before the first day of May next, and shall complete the same, and commence running cars thereon within eighteen months thereafter; and also,

Provided, that the said grantees shall run cars upon the road so constructed, each way between Fifty-first street and the Battery, every day as often as every fifteen minutes, from 5 to 6 A. M., and every four minutes from 6 A. M. to 8 P. M.; every fifteen minutes from 8 P. M. to 12 M., and as much oftener as public convenience may require, under such directions as the common council may from time to time prescribe; and,

Provided, that not more than five cents be charged for each passenger riding over the whole or any portion of the distance of said road; and also,

Provided, that said grantees shall keep the space between the tracks, and the space for two feet each side of the same, at all times in thorough repair; and also,

Provided, that the said cars shall be licensed by the mayor, and the grantees shall pay the annual fee of twenty dollars per car for such license; and also,

The said grantees, and their associates and assigns, shall have the privilege to organize a joint stock association, either with or without incorporation, to carry out the objects of this grant, and a majority in interest of the grantees, their assigns and associates, shall have the control, management and direction of the road, and the business thereof; and should any or either of the grantees or their associates, or of the shareholders, neglect to pay their respective proportion of the money required for carrying into full effect the grant hereby made, when by such majority thereunto required, the others shall be at liberty to make such payment, and this grant shall enure to the benefit of those who pay in the proportion of their respective contributions.

These resolutions shall be certified by said grantees above named, and a copy thereof, signed by them, shall be deemed the agreement between the mayor, aldermen and commonalty of the city of New York and said associates, and shall be sufficient in all respects to give and grant to the said grantees, their associates and assigns aforesaid, the right and privilege above mentioned, and bind them to conform to the directions herein contained.

And also provided that said rail road shall be continued from Fifty-first street, along the Ninth avenue, to the Bloomingdale road; thence along the Bloomingdale road to the Tenth avenue; thence along the Tenth avenue to the Harlem river, whenever required by the common council, and as soon and as fast as said avenues are graded.

Adopted by the board of assistants, December 20, 1852.

" " " aldermen, January 5, 1853.

Received from his honor the mayor, January 12, 1853, with his objections thereto.

Board of Aldermen, November 14, 1853. Taken up reconsidered and adopted, notwithstanding the objections of his honor the mayor thereto, two-thirds of the members elected voting in favor thereof.

Board of Assistants, December 28, 1853. On ayes and noes, adopted, notwithstanding the objections of his honor the mayor thereto, two-thirds of all the members elected voting in favor thereof; therefore, under the provisions of the amended char ter, the same became adopted.

D. T. VALENTINE, Clerk, C. C."

The following acceptance of the grant, by the defendants, was also proved: "City and county of New York, ss: We, James Murphy, William Radford and Miner C. Story, the grantees in the foregoing resolutions, do hereby certify, as therein required, that the said resolutions, and the conditions and provisions therein specified, contain the agreement between us and the mayor, aldermen and commonalty of the city of New York, in relation to the right, privilege and grant made and conferred upon us and our associates and assigns, by said mayor, aldermen and commonalty, in and by the same.

In witness whereof, we have hereunto subscribed our names, at the city of New York, the thirtieth day of December, one thousand eight hundred and fifty-three.

JAMES MURPHY,
WILLIAM RADFORD,
MINER C. STORY.

In the presence of John B. Haskin."

The following facts were found by the court. *First.* That the permission to lay down a rail road track was granted to the defendants, under certain resolutions set forth in the complaint and passed by the common council of this city.

Second. That such resolutions were accepted by the defendants, who executed the instrument provided therefor in such resolutions.

Third. That the defendants commenced the construction of such railway track within the time specified in such resolutions.

Fourth. That it was not proved that any offer more favorable

to the tax payers of the city or to passengers in the cars to be run over such track, than the permission granted to the defendants, was made in good faith to such common council.

Fifth. That the construction of such rail road along the line of either Washington or Greenwich streets, intermediate the intersection of the northerly line of Reade and the southerly line of Courtlandt streets, with said Washington and Greenwich streets, would inflict serious private injury upon the plaintiffs, in unduly obstructing them in approaches to their respective places of business adjoining upon such streets, amounting in its effects and consequences to a private nuisance to the plaintiffs, unless the grant is valid—but on the other parts of the line would be neither a public nor a private nuisance.

And the judge held, upon these facts, and as matter of law: *First.* That all proper legal formalities had been complied with in the passage of such resolutions requisite to render them valid.

Second. That it was a matter of discretion resting with the common council to determine whether or not such permission should be given. That having exercised such discretion, and made the grant in the manner and after the form required by law, it was an exercise of legislative discretion, which this court has not the power to rescind.

Third. That such grant was legal and valid, and that the defendants could not be restrained from proceeding with the construction of such road. That the injunction granted should be dissolved, and that the defendants have judgment therefor.

The complaint was therefore dismissed with costs, and the injunction dissolved. The plaintiffs excepted to the decision, in each of the above particulars, and appealed to the general term.

S. Beardsley and *John Van Buren*, for the appellants. The plaintiffs file this complaint to obtain relief against the contemplated acts of the defendants, which, as is claimed, threaten serious injury to their rights. Those rights are—1st. As tax payers and corporators, to restrain any unlawful disposition of the corporate property. 2d. As holders and occupants of property

on the line of Greenwich and Washington streets, to restrain any acts in said streets which would interrupt the passage, or interfere with their legal enjoyment of their property. The plaintiffs claim to do the acts which they are about to perform under the authority of an alleged resolution of the common council. If this is a valid authority, it constitutes a defense to the action; and whether it is valid or not, the plaintiffs have an obvious right to inquire. No question can possibly arise in this case as to the necessity of making the attorney general a prosecuting party, this not being an action to restrain a corporation from exercising a franchise, or to forfeit its charter, or in fact a suit against the corporation *at all.* It is an action by certain private individuals against certain other private individuals, to restrain an apprehended violation of private rights. Nor will this court now hear an argument on the question of the right of one tax payer in behalf of himself and such others as choose to become parties to the action, to restrain an illegal disposition of the corporate property, even by the corporation itself. (*Christopher* v. *Mayor of N. Y.* 13 *Barb.* 567. *De Baun* v. *Mayor of N. Y.* 16 *id.* 392. *Roosevelt* v. *Draper*, *Mss. Op. of supreme court*, *Mitchell, J. Milhau* v. *Sharp*, 15 *Barb.* 193. *Stuyvesant* v. *Pearsall*, *Id.* 244.) And when an illegal interference with a public street is threatened, an owner of property upon the street has uniformly been adjudged by this court entitled to restrain such interference. (*Corning* v. *Lowerre*, 6 *John. Ch.* 439. *Oakley* v. *Trustees of Williamsburgh*, 6 *Paige*, 262. *Lawrence* v. *Mayor of N. Y.* 2 *Barb.* 577. *Milhau* v. *Sharp*, 17 *id.* 444. *Eden on Inj.*, (*by Waterman*,) 259, 267, *and notes. Davis* v. *The Mayor &c. of N. Y.* 2 *Duer*, 663. 2 *Story's Eq. Jur.* §§ 925, 926. *People* v. *Sturtevant*, *court of appeals*, *Op. by Johnson, J. Spencer* v. *London and Birmingham R. R. Co.* 8 *Sim.* 193. *Sampson* v. *Smith*, *Id.* 272. *Davis* v. *Mayor &c. of N. Y.* 1 *Duer*, 451.) The evidence shows that the plaintiffs, in the year 1853, paid exceeding $13,000 for taxes on their property in the city; also that they severally own and occupy property upon the line of Greenwich or Washington streets, and have so owned and oc-

cupied for many years past. Also that the construction of the proposed road would injure the premises of the plaintiffs in a degree and to an extent which this court at special term, standing in place of a jury, found and determined would be "a private nuisance as respects these plaintiffs." Also that responsible individuals offered to construct the proposed road, and pay to the corporation $100 license fee on each car, and charge but 3 cents fare, instead of the license fee of $20 per car, and the 5 cents fare charged and permitted in the alleged grant to the defendants. Other testimony was offered at the trial, by the plaintiffs, showing bad faith in the making of the alleged grant to the defendants, but was objected to, excluded by the court, and exception taken. No testimony was offered on the part of the defendants, showing why the alleged grant was made to them, or why more advantageous offers were rejected, or why no competition was allowed. Notwithstanding, it appeared from the veto of the mayor, that their attention was directed to these prominent objections to the alleged grant. The grant in question was originally passed in the board of aldermen on November 22, 1852, as a grant to Kipp & Brown. It was amended in the board of assistants by substituting the names of the defendants, and in several other important particulars, and passed December 6, 1852. The terms of office of the members of this board of assistant aldermen expired by law on the first Monday of January, 1853. On January 5, 1853, the resolution as thus amended was passed by the board of aldermen. On January 12, 1853, it was returned to the board of aldermen by Mayor Westervelt, with his objections. On November 14, 1853, it was again passed by the board of aldermen, and on December 28, 1853, it was concurred in by the then board of assistant aldermen, notwithstanding said mayor's objections. The offer heretofore referred to was presented to the board of assistant aldermen by the president thereof, November 23, 1853. On November 29, 1853, a petition numerously signed by owners and occupants on Greenwich and Washington streets, was presented to said board of assistant aldermen, requesting a hearing on the subject of this grant. Such hearing was promised, but never

granted. The great value of the privileges sought to be conferred on the defendants is shown by the fact that the proposed rail road will be the only one extending to the southerly extremity of the city of New York, and the right of way for its entire length (exceeding 12 miles) is granted without any compensation whatever, unless the license fee of $20 per car be called such compensation. The cause was tried before Justice COWLES, commencing June 15, 1855, and the testimony was closed on the 26th of the same month. On August 14, 1855, the justice decided the cause. The judgment ordered was, that the preliminary injunction, previously granted, should be made perpetual, so as to restrain the construction of the proposed rail road, intermediate the southerly line of Courtlandt, and the notherly line of Reade street, on the ground found by the court, that "intermediate Reade and Courtlandt streets, the construction of the road would be a private nuisance, as respects these plaintiffs." The preliminary injunction was "in all other respects dissolved." Subsequently to this decision Justice Cowles ordered a re-argument upon two propositions stated by him. The first of those questions was thus stated by Justice Cowles, "assuming that the effect of running rail road cars through Washington and Greenwich streets, intermediate Reade and Courtland streets, would operate to obstruct the plaintiffs in approaching their stores and places of business, as stated in the opinion read to counsel in the case," have the plaintiffs a right to an injunction? After such re-argument, and on September 27, 1855, his honor the judge delivered his opinion, ordering judgment to be entered dissolving the preliminary injunction, and dismissing the complaint herein. The appellants insist,

I. The corporation of the city of New York had no power, in any way, or by any act, legislative or executive, to authorize the construction and use of this rail road. It had such powers as were *expressly* conferred upon it by its charter and by statute, and such as were necessary to the exercise of its express powers, and no other power whatever. The powers which it had it could only exercise in the *manner* and for the *purposes* and *objects* specified in its charter and by said statutes. (2 *Kent*

5th ed. 298. *Angell & Ames on Corp.* 2d *ed.* 64, 69, 193, 200. *Dart. Coll.* v. *Woodward*, 4 *Wheat.* 636. *The People* v. *The Utica Ins. Co.* 15 *John* 383. *Hodges* v. *The City of Buffalo*, 2 *Denio*, 112. *Berlin* v. *New Berlin*, 9 *Conn. R.* 175. *Talmage* v. *Pell*, 3 *Selden*, 328. *Broom's Leg. Max.* 198. 2 *Kent*, 290, 299. *Milhau* v. *Sharp*, 17 *Barb.* 443. *Head* v. *The Providence Ins. Co.* 2 *Cranch*, 167, 169. *Milhau* v. *Sharp*, 15 *Barb.* 211. *Bank of the U. S.* v. *Dandridge*, 12 *Wheat.* 68. *Bank of Augusta* v. *Earle*, 13 *Pet.* 587. *Angell & Ames*, 167. *Gaezler* v. *The Corporation of Georgetown*, 6 *Wheat.* 593, 597. *Sharp* v. *Speir*, 4 *Hill*, 83. *Thompson* v. *Schermerhorn*, 2 *Selden*, 92. *People* v. *Trustees of Geneva Coll.* 5 *Wend.* 220. *Att'y Gen.* v. *The Mayor &c. case, fols.* 442, 3, *Sup. Court, Gen. Term. The People* v. *Sturtevant, case, fol.* 600. *Davis* v. *Mayor &c. of N. Y.* 1 *Duer*, 508. *Brainard* v. *New London*, 22 *Conn. R.* 552. *Hood* v. *N. Y. and N. H. R. R. Co. Id.* 16. *Trustees First Bap. Church* v. *Brooklyn Ins. Co., N. Y. court of appeals, MS.*)

II. The fee of the street in front of the plaintiffs' lots, was in the plaintiffs, subject to the public easement. (*Willoughby* v. *Jenks*, 20 *Wend.* 96. *John and Cherry streets*, 19 *id.* 659, 675. *Gidney* v. *Earl*, 12 *id.* 98. *Cortelyou* v. *Van Brundt*, 2 *John.* 357. *Jackson* v. *Hathaway*, 15 *id.* 447. *Chester* v. *Alker*, 1 *Burr.* 133, 145. 1 *Day*, 103. *Livingston* v. *Mayor of N. Y.* 8 *Wend.* 85, 107. *Adams* v. *Saratoga and Wash. R. R.* 11 *Barb.* 414, 452. *Milhau* v. *Sharp*, 15 *Barb.* 193. *S. C.* 17 *id.* 435. *Lade* v. *Shepherd*, 2 *Strange*, 1004. *Barclay* v. *Howell*, 6 *Peters*, 494. *Wyman* v. *Mayor of N. Y.* 11 *Wend.* 487, 502. *Perley* v. *Chandler*, 6 *Mass. R.* 453. *Whitbeck* v. *Cook*, 15 *John.* 483. *Trustees of Presb. Church* v. *Auburn and Roch. R. R.* 3 *Hill*, 567. *Hammond* v. *McLachlan*, 1 *Sand. S. C. R.* 323. *Herring* v. *Fisher*, *Id.* 344. 3 *Kent*, 433. 4 *Smith's Lead. Cas.* 90, *Amer. note. Mohawk Bridge Co.* v. *The Utica and Sch. R. R.* 6 *Paige*, 562.)

III. The evidence offered by the defendants in support of the title of the corporation in these streets, by showing, from an inspection of the records of the common council, its usage in

respect to laying pipes, &c. in them, was not only incompetent to prove such title, but was irrelevant, and should have been excluded by the court. The exception thereto, by the plaintiffs, should have been allowed and the evidence rejected.

IV. The land in the site of the street cannot be taken for the purpose of establishing a rail road, without making just compensation to the owners of the soil. (*Const. art.* 1, §§ 6, 7. *Trustees Presb. Society* v. *Auburn and Roch. R. R.* 3 *Hill*, 567. *Fletcher* v. *Auburn and Syracuse R. R.* 25 *Wend.* 462.)

V. If the *corporation* had power to authorize the construction and use of this rail road, it could only have been done by the passage of a proper *law* by the common council, and a *contract* made in conformity with such law by some officer or department in the executive branch of the corporation. It could not be done, as was attempted in this case, by the *legislative* branch of the corporation, alone, to the entire exclusion of the *executive* branch. (*Laws of* 1830, *p.* 125, § 1; 1849, *p.* 278, § 1; 1853, *p.* 410, § 1; 1830, *p.* 128, § 21; 1849, *p.* 280, § 9; 281, §§ 12, 13, 14; 283, § 19; 284, §§ 21, 23. *Christopher* v. *The Mayor &c. of N. Y.* 13 *Barb.* 567. *De Baun* v. *The Same*, 16 *id.* 392. *Milhau* v. *Sharp*, 15 *id.* 193. *S. C.* 17 *id.* 435, 440.)

VI. If the corporation could authorize this rail road by a law or resolution passed by the common council, without any thing being done by the executive branch of the corporation, the resolution in question can have no such effect, not having been duly passed by the common council. (*Laws of* 1830, *p.* 127, §§ 12, 13, 14; 1849, *p.* 279, § 6. *Const. of N. Y.* 1846, *art.* 4, § 9; 1822, *art.* 1, § 12. *Const. of the U. S. art.* 1, § 7, *sub.* 2, 3.)

VII. The resolution, as accepted, is, by its terms, if valid, both a grant of the necessary power to make the rail road, and a contract to make it. The making of such a contract is an executive duty, and could only be performed by the executive branch of the corporation. It is expressly forbidden to the common council, in the following language: "Neither the common council nor any committee or member thereof shall perform any executive business whatever, except such as is or shall be especially imposed on them by the laws of the state, and except

that the board of aldermen may approve or reject the nominations of the mayor, as hereinafter provided." (*Laws of* 1849, *p.* 280, §§ 9, 13, 23. *Christopher* v. *The Mayor &c. of N. Y.* 13 *Barb.* 567. *Milhau* v. *Sharp*, 15 *id.* 212, 229, 232. *De Baun* v. *The Mayor &c. of N. Y.* 16 *id.* 392. *Milhau* v. *Sharp*, 17 *id.* 438. *Lawrence* v. *The Mayor &c. of N. Y.* 2 *id.* 577, 581. *Davis* v. *The Same*, 1 *Duer*, 508, 509. *People* v. *Sturtevant, N. Y. court of appeals, opinion of Johnson, J. p.* 13.) There is no analogy between authority exercised by the legislature, and that of one branch of a municipal corporation. (1.) The legislature represents the sovereign power of the state. (2.) It is not subject to the control of the courts in any way. (3.) It is not prohibited from performing executive acts; but on the contrary does, by making grants of franchises, and other property, by concurring in and by making appointments, and in various other ways, exercise executive powers. (*De Baun* v. *The Mayor &c.* 16 *Barb.* 398, 399. *The People* v. *Compton*, 1 *Duer*, 512.)

VIII. The right to make and use this rail road was a grant of "*public property*," or of a "*franchise*," or of both, and could only be disposed of by the corporation "at public auction, and to the highest bidder, who will give adequate security." (*Laws of* 1853, *p.* 411, § 7. 3 *Kent*, 6*th ed.*, 458, 459. 2 *Bl. Com.* 37. *Beekman* v. *The Sar. and Sch. R. R. Co.* 3 *Paige*, 75. *Charles River Bridge* v. *Warren Bridge*, 11 *Pet.* 639. 2 *Steph. Com.* 14. 1 *Crabb's Real Property*, §§ 623, 698. 2 *Hilliard's Real Property*, 45–74. *The People* v. *The Utica Ins. Co.* 15 *John.* 358. *Milhau* v. *Sharp*, 15 *Barb.* 214, 228, 229, 230. *Stuyvesant* v. *Pearsall*, *Id.* 245. *Milhau* v. *Sharp*, 17 *id.* 439, 440. *Davis* v. *The Mayor &c. Superior Court, Gen. T., case, pp.* 217, 118. *S. C., Special T., case, pp* 196, 107.) The decision in this case at special term, that this "is a mere permission revocable at the pleasure of the corporation," is directly in conflict with the terms of the contract, and with the well considered judgment of this court, and of the superior court at general term, and of the court of appeals.

IX. This resolution, as accepted, if valid, deprives the corporation, permanently, of its power to control and regulate the streets through which the rail road is to pass; but the corporation cannot, by its own act, unless authorized by the legislature, deprive itself of this power. (*Milhau* v. *Sharp*, 17 *Barb.* 437, 438, 440, 442. *Attorney General* v. *The Mayor*, *Superior Court*, *Gen. T.*, *case*, *fol.* 445 *to* 457. *S. C.*, *Special T.*, *Duer*, *J.*, *case*, *fols.* 388, 406. *People* v. *Compton*, 1 *Duer*, 551.)

X. The power of "regulating" the streets, which was formerly in the corporation at large, is now vested in the executive department, denominated the "street department," and it could not be taken from that department by any act of the common council. (*Laws of* 1849, *p.* 281, § 12. *Id.* 283, § 19. *Montgomerie Charter*, §§ 14, 16.)

XI. The power of the corporation to "repair" streets, is in the executive "department of repairs and supplies," and yet this resolution assumes to give that power, as to certain parts of the streets, &c. to the persons who are to make this rail road. This the common council had no power to do. (*Laws of* 1849, *p.* 281, § 13.)

XII. This resolution as accepted, if valid, gives to the parties named therein, an exclusive right to construct and use this rail road for their own profit. The corporation had no power to grant such a monopoly. (*Duer, J. Op. in the Superior Court. See the case, in court of appeals, of The Att'y Gen.* v. *The Mayor &c. fols.* 395, 396.)

XIII. This resolution is void, because, (1.) It deprives the corporation permanently of its power to regulate from time to time the rates of fare to be charged for the carriage of persons; of which power the common council had no right to deprive the corporation. (*Milhau* v. *Sharp*, 17 *Barb.* 441. 2 *R. L.* 1813, *p.* 146, § 272.) (2.) It usurps the authority of the mayor to license carriages; and in fact, confers licenses against his will, and in opposition to his veto. (*Milhau* v. *Sharp*, 15 *Barb.* 230. *S. C.* 17 *id.* 441. *Davis* v. *The Mayor &c. Superior Court*, *Sp. T.*, *Duer*, *J.*, *case*, *fols.* 404–6.) (3.) It absolves

the grantees from an obligation imposed on all travelers by a statute of this state. (2 *R. S.* 424, § 198. *Att'y Gen.* v. *The Mayor &c., Superior Court, case, fols.* 423–5, 457.) (4.) It confers rights and exempts the grantees, their assigns and associates, from consequences, in a manner not authorized by the constitution or laws of this state. (*Att'y Gen.* v. *The Mayor &c., Superior Court, Sp. T., Duer, J., case, fol.* 400; *S. C. Gen. T. fols.* 452–8. *Const. of N. Y.* 1846, *art.* 8, §§ 1, 3.)

XIV. Whatever interest in or power over the street rightfully belongs to the corporation; it holds the same as a trust, to be exercised for the public good; and the grant of these privileges for a trifling sum, with the right to demand five cents fare from travelers, when the trustees might have obtained a large sum for the grant, with a charge upon travelers of only three cents, was a palpable breach of trust, and a gross fraud upon the plaintiffs and all other tax payers, inhabitants and travelers in the city. (*People* v. *Sturtevant, case, fols.* 590, 595, 598. *Milhau* v. *Sharp*, 15 *Barb.* 214 *to* 218, 231, 232. *Milhau* v. *Sharp*, 17 *Barb.* 442, 444, 445. *De Baun* v. *Mayor &c. of N. Y.* 16 *id.* 292.)

XV. The court having found, as a fact, that "intermediate Reade and Courtlandt streets the construction of the road would be a private nuisance, as respects these plaintiffs," the judge erred in refusing to enjoin the construction of the road between those points. (1.) The plaintiffs, and all others similarly situated, have a right of action for the injuries done to their property by the construction of this road. (*Fish* v. *Dodge*, 4 *Denio*, 311, 316. *Drake* v. *Hudson River R. R. Co.* 7 *Barb.* 549. *Milhau* v. *Sharp*, 15 *id.* 214. 17 *id.* 445. *Tremain* v. *Cohoes Co.* 2 *Comst.* 163. *Hays* v. *Cohoes Co. id.* 159. *Rochester Co.* v. *City of Rochester*, 3 *id.* 463.) (2.) Having this right of action, they have a right to ask, and the court upon a case of this kind are bound to grant, an injunction to prevent, 1st. A prospective and irreparable injury to property. 2d. Multiplicity of actions. 3d. A purpresture or nuisance. (*Eden on Inj. by Waterman*, 259, 267, *and notes. Gardner* v. *Trustees of Newburgh*, 2 *John. Ch.* 162. *Corning* v. *Low*

erre, 6 *id.* 439. *Livingston* v. *Livingston*, *id.* 497. *Lawrence* v. *Mayor of N. Y.* 2 *Barb. S. C. R.* 587. *Brower* v. *Mayor &c. of N. Y.* 3 *id.* 254. *See cases cited under 17th point.*)

XVI. The act of April 4, 1854, does not apply to or aid this case. (*Laws of* 1854, *p.* 323.) (1.) The rail road in question was not commenced within the meaning, spirit or intent of the law. (2.) The exception in the 3d section was obviously intended to relieve certain city rail roads, (such as the Second, Third, Sixth and Eighth avenue rail roads.) then in existence, against the prohibition of the two first sections. (3.) It is manifest upon reading the act, that it was not thereby intended to abrogate, in any way, the 7th section of the amended charter of 1853. (4.) By the judgment of this court, acting instead of a jury, it has been determined that this rail road, if constructed, would be a nuisance to the plaintiffs, which it cannot be pretended either the common council or the legislature has authority to erect. (5.) Assuming that this act creates a corporation for the construction of this rail road, (and which it does, if the defendants construe it rightly,) it clearly violates the constitution of this state. (*Const. N. Y. art.* 8, §§ 1, 2, 3. *Id. art.* 1, § 7.)

XVII. If we are right in all or any of the foregoing propositions, it is clear that the judgment of the special term should be reversed, and an injunction ordered, as demanded by the complaint. (*Att'y Gen.* v. *Aspinwall*, 2 *Myl. & Cr.* 613. *Att'y Gen.* v. *Corp. Pool*, 4 *id.* 30. *Att'y Gen.* v. *Dublin*, 1 *Bligh, N. S. River Dun N.* v. *Midland R. R. Co.* 1 *Railway Cas.* 154, 5. *Frewin* v. *Lewis*, 4 *Myl. & Cr.* 255. *Corning* v. *Lowerre*, 6 *John. Ch.* 439. *Gardner* v. *Trustees of Newburgh*, 2 *id.* 162. *Varick* v. *Mayor of N. Y.* 4 *id.* 53. *Livingston* v. *Livingston*, 6 *id.* 497. *Oakley* v. *Trustees of Williamsburgh*, 6 *Paige*, 262. *Pettit* v. *Shepherd*, 5 *id.* 493. *Bromley* v. *Smith*, 1 *Simon's Ch. Cas.* 8. *Lawrence* v. *Mayor of N. Y.* 2 *Barb. S. C. R.* 587. *Eden on Inj. by Waterman*, 259, 267, *and notes. Brower* v. *Mayor of N. Y.* 3 *Barb. S. C. R.* 254. *Roberts* v. *Anderson*, 2 *John. Ch.* 202, 204.)

C. O'Conor, for the defendants. The objections taken to the grant in question, may be placed under two heads: First, the plaintiffs assert that certain injuries will result therefrom affecting their private property or personal rights; and secondly, they allege that it involves certain usurpations of power and other public wrongs or offenses against the state or the public. And by reason of their being tax payers, the plaintiffs claim a right to maintain a private civil action in equity in their own names, to restrain such usurpations, and to prevent or remedy such public wrongs or offenses. Laying out of view for the moment the question whether any such usurpation, public wrong or offense is involved in the grant, or is likely to result from any action under it, and assuming, for the sake of the argument under the first head, that the rail road might become a public nuisance, we will investigate so much of the plaintiffs' case as rests upon the assertion that the rail road may, by possibility, work an injury to their private property, personal rights or business. They allege that Greenwich and Washington streets belong, in fee simple, to the owners of lots fronting thereon, subject only to the right of way over those streets existing in the public at large, and that a rail road, whether it be a nuisance or not, is a new, peculiar and exclusive use of their property, differing from the servitude as a highway with which it is charged in favor of the public; and, consequently, such diversion of their property to a new use could not be made or authorized, even by the supreme legislature, without making them a proper compensation. They cite, in support of this position, *Gardner* v. *The Trustees of Newburgh*, (2 *John. Ch.* 162.) The conclusion is sound if the facts support it. If they are owners of the streets, and the public servitude in and over those streets does not embrace or include a right to use them for rail roads under the direction of the municipal authorities, then they have an undoubted right to say that this new use is an appropriation of their property which cannot lawfully be made without their consent, unless upon just compensation being made to them. This doctrine cannot be disputed. (1 *Yeates*, 169. 9 *S. & Rawle*, 32, 33. 3 *Watts*,

219.) We shall maintain, however, that the fee simple of those streets is not in the adjacent lot owners, but in the corporation; and even if the fee simple of the street be in the lot owners, still that the servitude is not that of a rural highway, but that of a city street, a distinction attended, as we shall show, with most important consequences. The fee holder, as we may term him, in a country road, has generally the whole interest in and profit of the land, except a right in the public to pass over the surface, and to perform such work upon it as may be necessary to keep it in repair. He has a right to all grass or other fruit produced upon it. He may plant trees upon it for his own use. (1 *R. S.* 525, § 127.) He may carry water pipes under it. (3 *Kent*, 433. 1 *Burr.* 143.) And, in short, he may make any other private use of it, or take any private profit from it, not absolutely inconsistent with the public right of passage. The servitude of a city street, when the fee is in a private person, is of a character far more comprehensive. The urban servitude confers upon the municipal authorities a right to pave the whole surface, so as to exclude the raising of grass, trees, or any profit of that sort; to restrain any disturbance whatever of such surface, or other private use of the street; to sink wells and erect pumps, lamp-posts and other like structures for public accommodations; to form subterranean sinks, drains or sewers; and to pass pipes beneath the surface for the purpose of supplying the inhabitants with water, gas, &c. In fact this servitude demands, to answer its object and purpose, the entire and exclusive use of the land upon or below the surface, and precludes any private use, occupation or employment of the space above. The adjacent lot owner cannot project a stoop, a bow-window, an awning or a sign-board, beyond the line of the street; neither can he construct a vault, cellar or cistern, beneath the surface. The uniform action of the municipal authorities, the uniform acquiescence of all persons in it, the uniform current of judicial opinion, prove this to be the common law of all our cities. Consequently it must be admitted that, when the fee of a city street is in private hands, it is unaccompanied by any present private right of enjoyment what-

ever. The whole usufruct is in the public. For all practical purposes, as a present interest, the fee is absorbed by the public use. It may subsist in contemplation of law, and possess capacity to quicken into life and become a valuable interest in case the highway should be discontinued; but this is a very remote and improbable contingency. The common law has always regarded such interests as of no account. The possibility of reverter, the contingent remainder, and the fee limited upon an estate tail, under the statute *de donis*, are instances of this. The first was never regarded as property, (2 *Kern.* 138;) the two latter were not only denied judicial protection, but encouragement was afforded to every device aimed at their destruction. (1 *Strange's R.* 295, 6 4 *Kent*, 253.) The shadowy interest (1 *Call*, 186) resulting from this remote possibility, that the public use of a street might cease, has been repeatedly pronounced insignificant in the court of last resort. In *Livingston* v. *The Mayor*, (8 *Wend.* 87, 88,) the supreme court and court of errors unanimously confirmed a report of commissioners, taking for public use such a fee in land worth $32,000, at the nominal value of one dollar. Twenty years subsequently, the present court of appeals affirmed the same principle. (*Heyward* v. *The Mayor*, 3 *Selden*, 325.) We contend, therefore, that if the fee of the street is in the adjacent lot owners, compensation is not due to them for the use thereof as a rail road. No present interest or right of enjoyment on their part is affected by such use; neither would it prevent or impede a reverter to them of the fee if the street should be legally discontinued. They part with nothing and can claim no recompense. (2 *Kernan*, 147.) Though, for the reasons just stated, we regard the point as no way necessary to our defense, still we insist that, under the evidence in this case, the corporation has the entire fee simple in the land occupied by Greenwich and Washington streets. The plaintiffs' counsel say it is "a *rule of the common law*," that the lot owners abutting upon a street, road or highway, take the fee of the land to the middle of the road, *usque ad medium filum viæ*. There is no such general "rule of law." Who owns the fee of

any particular piece of land, be it a road, a street, or any thing else, is always to be determined by the evidence adduced in the case in which the question arises. Tracing the title by patent and deed, devise or descent from the government to the present possessor, is the most certain legal evidence of title to land. But few examples of this certainty occur in practice; and the most usual evidence of title is possession. Until countervailed by other evidence, this amounts to full proof of a title in fee. But possession itself cannot always be directly proven; it is often merely constructive or presumptive. When the question arises between individuals as to the ownership of the fee in a road, if there be no evidence of a more certain character before the court, the common rules of presumption are necessarily resorted to for the purpose of ascertaining the fact. The primary resort would naturally be to the fact of possession; but who can be said to possess a public highway? "It is," says Justice Cowen, (20 *Wend.* 98,) "open and common to all the world, apparently, and as much so as to the adjacent lot owner." At the same page, the learned judge states the origin and *rationale* of the law on this point. To make out a constructive title to a road, the claimant "may prove himself to be in actual possession of the land adjoining." It is thence *presumed* that he is owner of the soil *usque ad filum viæ*, "unless a contrary right be proven." He says that such is undoubtedly the rule in England, citing Chief Baron Richards in *Cook* v. *Green*, (11 *Price*, 736, 739,) whose very words he adopts. Ch. J. Hosmer, in *Watson* v. *Southworth*, (5 *Conn. R.* 310,) says: "It is a general rule of the common law, that the fee of the land over which a highway passes, is owned equally by the owners of the adjacent ground. This rule, however, is not artificial, and of positive institution, but is founded on the presumption, *in absence of proof*, that the highway was laid out by the adjoining proprietors over their land in equal proportions. This is not *presumptio juris et de jure*, but a reasonable presumption based on probability. Where it appears, however, that the highway was laid wholly over the land of one person, the presumption is annulled." And citing the

like opinion of Judge Edmonds, in *Peck* v. *Smith*, (1 *Conn. R.* 127,) he concludes that to hold otherwise "by inference against the fact," would be an inequitable fiction, countenanced by no "principle of policy or general convenience." (*See also* 1 *Conn. R.* 146, 147.) In 7 *B. & Cres.* 308, Mr. Justice Holroyd calls it a "*prima facie* presumption." The public highways formed an important department of the government in ancient Rome. They were made by the state, and belonged to it absolutely. (*Gibbon's Decline and Fall, vol.* 1, *p.* 66, *Lond. ed.* 1838.) For the legal and historical authorities, see the same volume, *note n, to p.* 67. The Penns, as lord proprietors of Pennsylvania, acted upon the same policy; and consequently, we find the supreme court of that state ignoring the presumption to which we have referred, in *The Philadelphia and Trenton R. R. Co.* (6 *Wharton*, 43, 44.) It would not arise in any country whose civil polity thus provided for the forming of roads, by the direct action of the supreme government, on the public domain, at the cost of the public treasury. But the common law had its birth in Saxon England, and history informs us that prior to the Norman conquest there were no public highways in that country, except four great roads made by the Romans during their military occupation. (18*th Encycl. Brit. tit. Way*, *p.* 820, *Edinb. ed.* 1797. *Id. vol.* 16, *tit. Road*, *p.* 304.) The English government not having concerned itself on the subject, and roads being indispensable, they came into being in early times, by dedication or other private act; and, upon this head, as most others having any connection with the progress of the country in the arts of civilization, it is quite difficult to trace to their origin, by a distinct line of authorities, the doctrines which we find recognized in the law of our own times. The learned editor of Bacon's Abridgment says: "It seems that anciently there were but four highways in England, which were free and common to all the king's subjects," meaning, as we presume, the four Roman roads before alluded to. He adds: "All others, which we have at this day, are supposed to have been made through private persons' grounds. (3 *Bac. Abr.* 493, *tit. Highways*, A.) The courts

have ever been the auxiliaries of social improvement; and it appears that at a very early period they applied the principle of dedication, which has been so frequently illustrated in our own country, owing to the sudden founding and rapid growth of cities. (10 *Mod.* 150. 6 *Peters*, 431. 19 *Conn. R.* 265.) From their being thrown open, it was held that the public acquired a right to use the roads thus dedicated, and that any interruption of such right being *ad communem nocumentum*, was an indictable nuisance. The adjacent proprietors, for their own sakes, scoured and kept clean the ditches by the road side. This practice was soon seized upon, declared to be an usage, and, by consequence, obligatory as a duty. (4 *Viner's Abr.* 504, *tit. Chimin Common, B.* 3. 3 *Bac. Abr.* 497, *tit. Highway, E. Id.* 498, *F.*) There is no instance in English jurisprudence of a contest between the government and an individual concerning title to the fee of a road. Indeed there could not well be. The government of England, properly so called, was never recognized as the source of title. The whole territory was parceled out to individuals by the king, or retained in his own hands as *his* property. In either case the title was in an individual. The *jus publicum*, or mere user as highways of the king's great rivers, or of roads laid out by him on his royal demesnes, or by other great lords on their's, was in the people, and the government was their trustee, to guard and protect it. (1 *Hume's Eng.* 217, *Lond. ed.* 1841.) It is only in controversies between the lord of the manor and the occupant of adjacent lands that we can trace the rise and progress of the doctrine now under consideration. In *Woolwych on Ways, p.* 5, (4 *Law. Lib.*) it is said to be presumed that the proprietor of the land adjoining an ancient road "gave up to the public for passage, at some former period, the land between his inclosure and the middle of the road." The author cites Bayley J., (7 *B. & Cr.* 306.) This, it will be seen, was only a presumption in accordance with the known truth of history. When, therefore, the lord of the manor owned the adjacent land, there could be no doubt as to the fee, and when he was found to have granted away the adjacent land, there

being no just reason to suppose that he had intended to reserve the road, it was assumed that he had bounded his grantee *upon* the road, and, as that word standing alone should be construed, by the center line thereof. (1 *Sandf. S. C. R.* 341. 7 *B. & Cr.* 307, *per Holroyd, J.*) Thus the English judicial practice came by very simple and natural steps to its conclusion, that the occupant of the adjacent lands being *prima facie* owner thereof in fee, he was also *prima facie* owner of the fee to the center of the road, and had all the possession of that portion of the road which was consistent with the public use. Their reasoning is best exemplified in the cases which have arisen between manorial lords and adjoining proprietors in respect to the ownership of strips of land lying between the nearest inclosure and the highway. In all these cases the *same* presumption—and upon the same ground—has been allowed in favor of the owner of the adjacent inclosure; but the lord has been always allowed to displace it, if he could, by circumstantial evidence impugning the presumptive possession of the inclosure-man arising from his proximity. (*Grose* v. *West*, 7 *Taunt.* 41. *Doe* v. *Kemp*, 7 *Bing.* 332. 2 *id. N. C.* 102. *Steel* v. *Prickett*, 2 *Starkie*, 463. *Doe* v. *Pearsey*, 7 *B. & Cres.* 307.) The title to highways in America is not involved in the mist of remote antiquity; and there never was much occasion to resort to the English books for a rule in respect to it. Every state in the union has adopted express statutes for the laying out and establishment of highways; and, with a very few exceptions, these statutes are so expressly worded as to condemn to public use no more than the right of passage, leaving in the proprietor every other interest in the soil. The provisions of our own state highway act, (1 *R. S.* 513,) furnish a fair specimen. Under such a course of legislation and practice, the courts, *when no evidence to the contrary appeared*, could not avoid drawing precisely a like inference to that which arose under the English system, i. e. that he who owned the land on each side of a highway had the fee of the highway itself, and that opposite lot owners respectively held to the center of the road. (2 *John.* 363. 12 *Wend.* 98. 4 *Iredell's*

Law R. 320. *U. S.* v. *Harris*, 1 *Sumner*, 34; *and opinions of the Att'ys Genl. U. S.* 777, 816, 845.) Independently of any thing said in the English authorities, our courts could not have arrived at a different conclusion. But it is quite clear that when the title to the adjacent lot is put in evidence, and its boundary on the road is shown not to extend into the road bed, the presumption which might else arise in favor of the lot owner is displaced. See the remarks of Ch. J. Hosmer, (5 *Conn. R.* 310, *above cited;*) also *Union Burial Ground* v. *Robinson*, (5 *Wharton*, 23;) the cases cited by Mr. Beardsley arguendo, 4 *Hill*, 370; *Jackson* v. *Hathaway*, (15 *John.* 453;) *Tyler* v. *Hammond*, (11 *Pick.* 213,) and Mr. Justice Story's comment on the last two cases, in 1 *Sumner*, 31, 32; *Hare & Wallace's note to Dovastan* v. *Payne*, (2 *Smith's Leading Cases*, 143, 44 *Law. Lib.*) This was the very point ruled in the case of *Willoughby* v. *Jenks*, (20 *Wend.* 96,) on which the plaintiffs rely. *John and Cherry Streets*, (19 *id.* 659,) also cited by the plaintiffs, contains nothing favoring their views. It was admitted that the streets belonged to private individuals, and not to the corporation. (*Id.* 667.) And Judge Cowen says, at page 670, that in the absence of evidence or even "*argument*" to the contrary, he felt bound to presume that the street belonged to the adjacent owners. It will be seen, therefore, that the claim of adjacent lot owners to the fee of the street—*ad medium filum viæ*—like every other question of title to land, depends upon the evidence given in the particular case, and the ordinary legal rules of presumption applicable to the facts proved.

Let us, then, refer to the proofs in this case: Washington street was formed, at quite a recent date, upon the land under water which was granted to the corporation by the 38th section of its charter. (*See Montgomerie's Char.* § 38; *Davies' Laws*, 193.) Greenwich street is shown to have come into being as a road along the water's edge *within* 100 years. The same charter, which, be it observed, is more than 100 years old, (§ 37,) granted to the corporation all the "unpatented and unappropriated land lying and being within the said city of New York

and on Manhattan's Island aforesaid, extending to the low water mark." Thus we show a title to both streets in the corporation, derived directly from the sovereign or fountain and source of all title, unless a prior patent or appropriation existed, or the corporation has subsequently granted them. (*Hoffman's Treatise, Appendix note*, 47.) The existence of such grant is an affirmative, the burthen of proving which rests upon the plaintiffs, and they have made no attempt whatever to maintain it. (2 *Kern.* 242.) They repose upon a mere present possession *alongside of the street*, and claim, *as against the government of the city*, that they are thence to be presumed to have a grant of the street itself from the government. For this pretense there is no color. But let us give them all the benefit of treating the question upon the precise basis of a controversy in England between an adjacent lot owner and the lord of the manor, concerning the title to a road. Even there no presumption arises in favor of the adjacent proprietor, except that resulting from a sort of "*constructive* possession" of the road, as Judge Cowen calls it. (20 *Wend.* 98.) Evidence is admissible on this, as on all questions *in pais*. (*Cooke* v. *Green*, 11 *Price*, 218.) *Woolwych on Ways*, *p.* 5, says, that "Acts of ownership exercised by the lord may be admitted to repel" this presumption in favor of the lot owner. *Grose* v. *West*, (7 *Taunt.* 42,) as well as the decision and very pertinent remarks of Bailey, J. at nisi prius, in *Headlam* v. *Hedley*, (1 *Holt*, 464,) fully sustain him. The same writer says, at p. 8, "Taking the profits is the best badge of ownership. The cases may be well reconciled by setting up the presumption of ownership in the adjoining proprietors in the first instance, subject to be defeated by a prescription, or well founded custom, on the part of the lord of the manor." Lord Mansfield fully discusses, on principle, the question of title between the lord and the adjoining owner, in *Lofft's Reports*, 359. He says: "Where is the first presumption on the naked strict abstracted case? I think on the reason of the thing, when the naked presumption stands stripped of evidence, that it is in the owner of the land on each side." But this is only such a presumption as is not like a title. "How does the presumption

stand in favor of the lord?" He mentions some circumstances, and among them that one of the tenants *agreed to pay the lord five guineas for gathering coals on the soil*, and adds, "This is strong evidence." The judge, at the trial, had instructed the jury that the evidence in favor of the lord was not strong enough to repel the presumption. The court thinking otherwise, awarded a new trial. In *Doe* v. *Pearsey*, (7 *Barn. & Cres.* 308,) Holroyd, J. says: "Evidence may be given to rebut the *prima facie* presumption." Littledale, J. says: "If any act of ownership by the lord of the manor be given in evidence, then there will be an end of the presumption." This being the law of the case, we ask how stands the evidence. The corporation has, "time out of mind," regulated and controlled the use of the streets above and below the surface. It has regulated the walks, the extent to which adjacent proprietors might form stoops, bow windows, signs, awnings and awning posts, and every other use of the street. It has allowed the soil to be subverted for Manhattan water pipes, Croton water pipes, gas pipes, sewers and the like. It has exacted from the adjacent proprietors compensation for licenses to use the soil beneath the street for private vaults; and every one of the plaintiffs in this action have submitted to that very exaction. An attempt was made to weaken the conclusion deducible from this admission by suggesting that it was a mere arrangement between the municipal government, as trustee for the public right of way, and the owner of the fee, the latter allowing to the former a premium for the temporary interruption of the right of passage. This construction is inadmissible. The corporation of New York has statutory power to discontinue a road or street; but whilst it continues a public highway, neither the corporation nor any individual can, for an instant, appropriate it to any *private* use. Therefore it cannot lawfully be presumed that the plaintiffs paid the corporation to collude with them in violating law, or, in other words, bribed it to wink at a misdemeanor. This technical answer would suffice; but more conclusive answers can be given. Many of the cases cited in this argument show that an adjacent lot owner, when building, may temporarily inclose a

part of the public highway in front of his work. This is allowed by the common law, upon its own sound and conservative policy. It is allowed for the public good. Buildings are needed, and the erection of them subserves the common weal; their erection on the highways' verge exposes passers-by to the danger of falling into the excavation, or being wounded by the accidental falling of materials upon them. To aid in effectually guarding against such mishaps, the law wisely allows this temporary inclosure of a reasonable part of the highway. (4 *Ad. & Ellis*, 384. 31 *Eng. C. L.* 97.) In New York this practice is regulated by the corporation, and nothing has ever been charged for a license to incumber the streets whilst building. A conclusive circumstance remains to be noticed. The charge for vaults, &c. is so much per *cubic* foot of the space occupied. This shows that it has relation to the use of the *fee*. If it had reference to the interruption, it would be graduated by the superficial measure merely. This is *conclusive* evidence that the adjacent lot owners are not, and that the corporation is, *in possession of these streets;* and such possession coincides with the sovereign grant in fee simple to the corporation; and thus the title of that body to the fee of the streets is placed beyond a doubt. If it were necessary to fortify these proofs of title in the corporation, it could easily be done. The public history of the country may be taken notice of by the court, and forms a proper element of decision. (3 *Howard's U. S. R.* 24.) This colony was first settled by Holland, and was consequently governed *de facto*, at the time of its settlement, by the civil law. "It is the undoubted rule of that law that highways, *viæ publicæ*, belong to the sovereign power as part of its royalties or public rights. They belong to it absolutely; there is no right in the adjacent owners, to the soil of the road either during the use or upon its discontinuance." (*Hoffman's Treatise*, 258.) The same work, tracing the history of our laws from the Dongan charter to the adoption of our present street system, shows that the practice of vesting the fee simple of the streets in the municipal government has been uniformly adhered to in this city. (*Id.* 269 *to* 276.) The only difference between the Dutch

rule with which this history begins, and the English colonial and state practice which succeeded it, is this: Instead of retaining the title to public ways in the supreme government, it has been vested in the municipal government. (*See act of March* 7, 1793, *cited in Hoff. Treat. p.* 274.) This difference is only modal, and has its origin in the difference between the civil and common law *practice* touching public ways. The English charters granted all existing public streets and ways to the corporation; the provincial act, October 9, 1691, (1 *Smith & Liv.* 12,) which was re-enacted by the state law of April 16, 1787, (1 *Greenl.* 441,) gave the corporation the fee simple of all new streets which they might open. (*See Heyward* v. *Corporation*, 3 *Selden*, 314.) This system has been matured and perpetuated by the subsequent legislation now in force. (2 *R. L. of* 1813, *p.* 414. *See remarks of Jones, P. J.* 7 *Barb.* 536.) If the charters of the city, and such facts as have been shown in this case, had been presented to the supreme court in the *John and Cherry streets case*, (19 *Wend.* 667, 675,) the learned judge would not have complained that he was left to grope in the dark without evidence, reason or argument, and probably he would not have applied to an ancient street in the city of New York the wholly inapplicable doctrines which govern in controversies between an English manorial lord and his tenants, or those arising under a system so very different as the statutes for the establishment of rural highways. In referring to the temporary local law existing during the hostile and wrongful occupation of this island by the Dutch, we do not mean to claim, in opposition to what is said in 5 *Wend.* 445, that the rules of the Dutch civil law acquired any foothold *as law* in this state. We refer only to the *fact;* and the fact is that this city was settled by the Dutch; that when the first lot owners or lot holders upon streets or highways entered into possession, it was understood between them and the power which made their allotments, that they took only to the side line of the streets, and nothing *in* the streets. It is the fact that streets and roads were formed, and that the city was built on this understanding; and that when Britain expelled the intrusive power of Holland and re-

sumed her lawful possession, she adopted the existing settlement with its existing customs, and, in this particular, repeatedly and solemnly ratified and sanctioned them by the charters and acts of legislation to which we have referred. If aid were needed, these facts come in aid of the presumption that lot owners in the city of New York never had, or claimed, any title or interest of any kind in the streets of the city in front of their lots. Independently of any title in the soil of the streets, the plaintiffs object to the establishment of a rail road in Washington and Greenwich streets, on the ground that the mode in which they now use those streets, between Laight and Liberty streets, must, in that event, be discontinued; and that such discontinuance will lessen the rent and impair the value of their lots. The only injury to their stores and lots which they point out is, that the rail road will produce a difficulty of "*backing up*" carts against the curb stone as usual. The evidence shows that butchers, cartmen, and others in that vicinity, now keep their horses and carts backed against the side walks, and otherwise standing idle and unemployed a large portion of the day; and that most of the dealers there occupy parts of the street as places of deposit and sale for their goods. No grievance to the plaintiffs can arise from the suppression of these practices. The practices, so profitable to the plaintiffs, by which Washington and Greenwich streets are diverted from the public use as highways, and converted into additions to the stores of the dealers therein, or places of deposit for their carts and of rest for their horses, are indictable as misdemeanors. Their forcible suppression, however unprofitable to the plaintiffs, will be the abatement of a public nuisance and a highly meritorious act. (14 *Conn. R.* 318.) To establish this position, we refer to the following cases: *Rex* v. *Cross*, (3 *Camp.* 226;) *Rex* v. *Jones*, (*Id.* 230;) *The King* v. *Russell*, (6 *East*, 427;) *Rex* v. *Carlile*, (6 *Car. & P.* 636;) *Dovaston* v. *Payne*, (2 *H. Black.* 529;) 2 *Smith's Lead. Cas.* 90, 4 *Law Lib.*; *Fowler* v. *Saunders*, (*Cro. Jac.* 446.) All this doctrine is fully confirmed by the supreme court of this state in *The People* v. *Cunningham*, (1

Denio, 524.) See also *Burnham* v. *Hotchkiss*, (14 *Conn R* 317, 318.)

In respect to rivers, which are public highways, this same question has undergone discussion, and led to a very instructive conflict of judicial opinion in England. The doctrine which ultimately prevailed was, that a public highway was for *passing and repassing*, and that no obstruction or diminution, however slight, of its capacity for that identical use, could be tolerated, even though such obstruction was beneficial to the public *in other respects*. (*See The King* v. *Russell et al.*, 6 *B. & Cres.* 566. *Respublica* v. *Caldwell*, 1 *Dallas*, 150; *Acc.* 14 *Conn. R.* 323. *The King* v. *Ward*, 4 *Ad. & Ellis*, 384.) It therefore seems that, at common law, a public highway, whether a river or a street, cannot lawfully be appropriated to any private use on any consideration whatever, nor in any way interfered with by private authority, even for a public use, unless indeed by some act which facilitates passage and repassage. Of course, the legislature may vary the use; but that is only because it has power to *change the law*. (*King* v. *Pease*, 4 *B. & Ad.* 30, *end of case.*) The plaintiffs claim, however, that even if they have not the fee of the street, yet that in virtue of their frontage upon the street, an interest in the street, in the nature of a private way, is an incorporeal hereditament appertaining to their lots; and that, if the rail road should be a nuisance, it would be an interruption or invasion of such *private* right. We concede that there may be a private interest of this kind in a public street. But it is a very special kind of interest; and for that reason it requires precise proof. (12 *Wend.* 173. 1 *Man. & Gr.* 484, 392.) It cannot be inferred from the mere fact of proximity; and no attempt whatever has been made to prove it. That the owner of land adjoining a public highway has some interest therein, *merely by reason of his proximity*, is a vulgar error which has been extensively prevalent. (1 *Conn. R.* 146, 147.) It was distinctly brought to the test, and condemned as a heresy, by the court of last resort in *Gould* v. *The Hudson River R. R. Co.* (2 *Selden*, 541.) We have already shown the strict legal analogy which exists between

highways on land and on the water. (*See* 21 *Conn. R.* 325; 11 *Barb.* 452.)

No doctrine is more firmly settled upon authority than that, for a public nuisance, the government alone can prosecute. Many authorities will be cited to that effect. We will offer a few in this connection, because their peculiar circumstances give them a bearing on the question immediately before us. In each of the following cases it is said that those who do not suffer by a violation of law, otherwise than as members of the community, cannot maintain any remedial action. (*Harkness* v. *Waldo, com.*, 26 *Maine R.* 356. *Clerk* v. *Saybrook*, 21 *Conn. R.* 326, 7. *Smith* v. *Boston*, 7 *Cush.* 255. *Mountvernon* v. *Dusouchet*, 2 *Carter's Ind. Rep.* 588. *Sutherland* v. *Jackson*, 30 *Maine R.* 466.) If a public nuisance work a private injury to a particular person, that person may have a remedy by private action for damages, and in a proper case may have an injunction. This we admit unqualifiedly; but the question remains, what effect of a public nuisance in the highway will, in judgment of law, work a private injury to an adjacent lot owner. A noisome odor issuing from a nuisance, placed in the public highway, will have this effect, because it is not confined to the public property, viz. the highway. It pervades the surrounding atmosphere, enters the adjacent premises, and either endangers health or disturbs the comfort of those dwelling therein. (5 *Barb.* 86, *and cases cited.*) A noise upon the public highway, in like manner, penetrates the premises adjoining, and disturbs the occupant. (*Id.* 87, *and cases cited.*) Probably these are the only instances in which a nuisance in the public highway can work a particular injury to a private individual *merely in virtue of his proximity.* And, in these cases, actual contiguity of the lot and the highway is not material. It is enough that the lot, whose owner complains, lies near enough to the nuisance to be specially affected by it. (*Whitfield* v. *Rogers*, 26 *Miss. R.* 87.) The only other cases in which a private injury may result from a nuisance in a highway, are those where the actual *passage* is thereby interfered with. For instance, if an obstruction cause one to fall and injure his person

or break his carriage, or injure his horse, a special action lies If, by means of an impediment on a public highway, a man is arrested in his progress over it, and put to expense, this is a special damage for which a private action will lie. See in point the able opinion of Ch. J. Shaw in *Smith* v. *Boston*, (7 *Cush.* 255.) See the observations of the supreme court of Connecticut precisely in the same tenor in 17 *Conn. R.* 376, *point* 2. See also *Rose* v. *Miles*, (4 *Maule & Sel.* 104;) *Pierce* v. *Dart*, (7 *Cowen*, 611;) *Dougherty* v. *Bunting*, (1 *Sandf. S. C. R.* 4.) It will be seen that these cases of special damage which entitle one to an action are all cases of actual injury, and that they all arise in the exercise of the common right of passage which belongs equally to every citizen, and which is, in no respect, peculiar to the adjacent proprietor. The right of action for such an injury is no *less* perfect because the plaintiff resides, or because his only property lies, 100 miles distant from the *locus in quo;* nor is it the more perfect because he happens to own an adjoining lot. The *gravamen* of his complaint—its whole essence—is, that he had a right of passage, was hindered from using it, and thereby suffered a special injury. It is quite clear that, in some cases, a lot holder may have rare occasion to use an adjoining street. He may own no horse or carriage, nor be resorted unto by those who do. A couple of feet in the footpath may be all he needs, whilst all his neighbors in an adjoining cross street may have hourly occasion to pass his door with their horses and carriages. In such a case an obstruction in the cart way would be no injury to him, and a great injury to them. Yet it would be no private cause of action for either, so long as the injury was *merely in contemplation.* These considerations—and they might be illustrated to any length—show that proximity of landed property to the *locus in quo* does not enter into the question, what is a private injury from *an obstruction* in the public highway, which will give an individual a right of action. It will be seen, therefore, that in case of a nuisance by *obstruction* of a public highway, a *private* person can have no action, except for an actual injury received. The mere apprehension that a private injury may be received by

one who thinks himself more likely to suffer prejudice than others, affords no foundation for an appeal to the preventive justice of equity. (*Irwin* v. *Dixon*, 9 *How. U. S. R.*, *foot of page* 27, 28.) An injunction cannot be allowed to prevent an obstruction in a highway on the apprehension that the plaintiff may happen to desire to pass, and may possibly be impeded. (*Anon.* 3 *Atk.* 750.) It is not allowable to mount conjecture upon conjecture in this way.

A single decision of Chancellor Kent has been cited in support of the doctrine that an adjacent lot owner may have a private action to restrain an obstruction of the street on which he fronts. He says: "The obstruction was not only a common and public nuisance, but worked a *special* injury to the plaintiffs." (*Corning* v. *Lowerre*, 6 *John. Ch. R.* 439.) Although this decision was made by an eminent judge, it was made upon an *ex parte* argument, and therefore it is of little weight as authority. It may be also that the bill contained some special facts not stated in Mr. Johnson's very brief report. If the learned chancellor intended to affirm that mere contiguity to a highway gave to a lot holder a private interest in the road distinct from that of the public, his decision was inconsistent with that of Chief Justice Shaw in 7 *Cushing*, 255, and with *Jackson* v. *Hathaway*, (15 *John.* 447,) and was overruled by *Lansing* v. *Smith*, (8 *Cowen*, 148 *to* 150; 4 *Wend.* 19 *to* 24,) and again by *Gould* v. *Hudson River R. R. Co.* (2 *Seld.* 541.) The pretense that an adjacent proprietor suffers in judgment of law, any special injury from the mere existence of an obstruction to a highway, is also well answered by the supreme court of a sister state, in *Seeley* v. *Bishop*, (19 *Conn. R.* 135.)

We now proceed to the second set of objections presented by the plaintiffs. They assert: 1st. That this rail road will be a *public* nuisance. 2d. That, in establishing this rail road, the corporation was guilty of an usurpation of powers not vested in it, because it has thereby "attempted to grant powers, privileges and immunities of a public nature, which cannot lawfully be exercised without the authority of the legislature;" because "it has attempted to limit and abridge the future exercise of its

own legislative powers over two of the principal streets and most important thoroughfares of the city;" because it has thereby attempted "to usurp the power of the mayor to license carriages, or to compel him to give licences against his will;" and because it has attempted "to absolve the grantees from the obligation" to turn their carriages to the right when meeting other carriages, "which is imposed upon them by a statute of this state." 3d. That the corporation, in making the grant in question, was guilty of a breach of its public trust and duty in not accepting the offer of Lynch and his two associates to pay $40 per annum for each car, and to charge each passenger only three cents, instead of the defendants' proposal, which was to pay $20 per annum for each car, charging passengers five cents. 4th. That the corporation exercised its powers in an irregular manner and in violation of the statutes enacted for its government, in the following particulars, viz. that the grant being in itself, so far as the corporation was concerned, a complete and perfect contract, was not a legislative act, and consequently not within the "legislative power" of the common council; and if it was within such power, then that the aldermen in office in 1853 could not lawfully act upon and confirm a resolution passed by the assistants of the year previous; that the grant was substantially a contract to perform work for the corporation, which could only be made by an executive department, and which the common council was prohibited from making by the amended charter of 1849, § 23; that it was an attempt to sell a franchise and property of the corporation otherwise than "at auction and to the highest bidder," contrary to the amended *charter of* 1853, § 7; and, lastly, that the rail road would be a particular and exclusive use of streets of which "all citizens were entitled to a free and common use." This formidable list of objections is taken from the plaintiffs' printed points. We have thus grouped them under one head, because they all go upon some alleged violation of a *public* duty—some alleged usurpation of powers not granted, or illegal exercise of them. All these being matters with which no private individual has any concern, and which the state alone can complain of, we wish to present pre-

liminarily our protest against their being noticed, or at all considered in this case. Until very recently it was part of the *A*, *B*, *C*, of the law—and every where beyond this district it is still so—*that no private action* can be maintained by an individual for a public offense, or any wrong against the state. Public nuisances were subject to indictment; and, in aid of the courts of law, *equity*, at the suit of the government, would grant injunctions to restrain them. Usurpations of powers or franchises by corporations or individuals, were subject to the jurisdiction of the king's bench or supreme court by prohibition or quo warranto, or information in the nature of a quo warranto. Equity might, perhaps, lend its auxiliary remedies, if needed, even in such cases. Breaches of *public* trusts by corporations, or public bodies, or functionaries, might be restrained and corrected by equitable action prosecuted by the state, in its own name, or by its attorney general. Had this still continued to be, as is said in 19 *Conn. R.* 135, "too familiar to require a reference to authorities," our argument might end here. But we are told that any one who pays taxes may arraign the municipal authorities at the bar of the civil courts for each and every of their acts affecting the public interests, in a civil suit, and compel them to justify their motives, as well as the expediency and the strict legal regularity of all their proceedings. But that this doctrine has been sanctioned in high places, it might be treated with levity. We proceed to show how it *now* stands upon authority. The notion that a tax payer, *as such*, could file a bill in equity, or maintain any suit against a municipal corporation or its grantees, for misuser of its powers, excess of authority, or other violation of its public duty, was first presented to this court in 1847. (*Adriance* v. *The Mayor*, 1 *Barb. S. C. R.* 19.) The case was heard, *ex parte*, at special term, on a bill taken *pro confesso*. Edmonds, J., doubted the jurisdiction; but, *as there was no defense*, he declined to dismiss the suit, "*mero motu*," as he expressed it. The point was distinctly presented to this court, at a general term held before Edwards, Roosevelt and Mitchell, Js. The first expressed the opinion that a tax payer could

maintain the action; the second concurred in the general result; Mitchell, J., dissented from the result, but expressed no opinion on this point. (*Christopher* v. *The Mayor &c.* 13 *Barb.* 571.) The question next came up in the superior court. on the aldermen's contempt procedings in the Broadway railway case. (1 *Duer*, 475, *point third.*) Mr. J. Bosworth, at p. 507, expressed an opinion *against* the right; but as the plaintiffs rested their case, in part, on an alleged injury to their private property, it did not become necessary *then* to decide it. (*See observations of Duer, J., in* 2 *Duer*, 664, 665.) In *Milhau* v. *Sharp*, (15 *Barb.* 219,) Edwards, J., adhered to his former opinion; Strong, J., said nothing on the point; Morris, J., who had himself, as counsel for the plaintiff, argued the Christopher case in 13 *Barb.* 567, while he dissented from the decision, observed silence on this particular point. In *De Baun* v. *The Mayor*, (16 *Barb.* 393,) Mitchell, J., declined as in the Christopher case to express his opinion, but treated the question as settled upon authority in this district. Judge Roosevelt, at p. 401, admits it to be a new practice to allow a tax payer to sue. But he had allowed the injunction in the Christopher case, and he disposed of the want of precedent, as follows: "The whole history of the common law is a history of *unheard of* proceedings. Its leading principle, and its chief recommendation, are its power of adapting itself to the ever-varying changes of society; and, if *unheard of* grievances arise, *unheard of* remedies, if necessary, may be applied." The last mentioned case was heard before *five* judges. Two of them, Edmonds and Morris, Js., dissented. Where the majority is slender, the authoritative force of a decision is lessened. (*Per Marshall, Ch. J.*, 4 *Cranch*, 376.) Morris, J., at p. 411, strongly and decidedly holds that a *tax payer*, as such, cannot maintain a suit to restrain corporate abuse of power *in a street case.* He says: "The point presented that a private citizen cannot institute proceedings against a municipal corporation to restrain excess of jurisdiction, but that such suit must be instituted by the attorney general, is well taken." Harris, J., in *Milhau* v *Sharp*, (17 *Barb.* 445,) avoids the point, and puts the case on

the ground that the illegality of the act, coupled with the consequential injury to the plaintiffs' *private property*, gives them a right of action. He was probably quite mistaken in supposing that, upon the proofs before him, the plaintiffs had shown any *private* injury. That, however, is not material to the present inquiry. The Broadway rail road case was brought to a final hearing in the superior court, before Duer, J. He held that the plaintiffs had established no private injury to themselves; and it then became of vital importance to determine whether, *as tax payers*, they could maintain an action for the supposed public injury. He directed the question to be re-argued, and after the re-argument, in a very able and conclusive opinion, he held that the state alone, by its attorney general, could maintain the action. (*Davis & Palmer* v. *Mayor*, 2 *Duer*, 664.) The plaintiffs acquiesced in this decision. The result of this review is as follows: Edwards and Roosevelt, Js. have held that a tax payer may sue. It is possible that Mitchell and Strong, Js., may be regarded as having, to some extent, acquiesced. On the other hand, Edmonds, Morris, Bosworth and Duer, Js., have expressly and distinctly held the contrary. Voices appear to be about equal. The judgment of the superior court is last, and is adverse to the right claimed. We submit that the review in 2 *Duer*, 664, of the Christopher case, in this court, is most satisfactory. (2 *Sandf. S. C. R.* 52, *and* 10 *How. Pr. R.* 523.) Judge Duer reposes on the English cases; but there are also very controling authorities on this side of the Atlantic which fully support his conclusion. (*Beveridge* v. *Lacey*, 3 *Rand.* 63. *Seeley* v. *Bishop*, 19 *Conn. R.* 135. *O'Brien* v. *Norwich and Worcester R. R. Co.* 17 *id.* 376. 14 *id.* 578, 579. *State* v. *The Corporation of Mobile*, 5 *Porter's R.* 312, 313, 293.) To which we add, as a conclusive authority, the judgment of the supreme court of the United States directly on the point. (*City of Georgetown* v. *The Alexandria Canal Co.* 12 *Peters*, 98, 99, 100.) In that case, it was expressly decided that a city corporation, or *all the citizens thereof united, in their individual capacities*, could not maintain an action for the obstruction of a public high-

way therein. "The complainants," says the court, "must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have *averred and proved* that they were the owners of property liable to be affected by the nuisance, and that, *in point of fact*, it was so affected, so that they *had thereby suffered* a special damage." We submit, on this review of the authorities, that the weight of judicial opinion, even in this district, is *now* against the plaintiffs on this point. And, as a consequence, the plaintiffs must fail, unless they have established that the construction of this rail road would work an injury to some private right of property vested in them. If it tends to create a public nuisance—if it involves an usurpation of powers, an irregular exercise of them, or the breach of a public trust on the part of the corporation—the state alone can complain. It was suggested that if this point should be ruled against the plaintiffs, they ought to be allowed to amend. This is a very singular proposition. Where a party, having no right of action whatever, succeeds in raising a doubt, whether somebody else may not have a right, the true course to be pursued would seem to be very clear. Let him who has the right bring his action if he will, or acquiesce, if he pleases. What right has a stranger to interfere between the trespasser and the trespassed against? (14 *Illinois R.* 446.) This is not the case of a party having a right of action, whose suit is incapable of being fairly decided without the presence of other parties, and who is, therefore, allowed to make it perfect by introducing such parties. (4 *Peters' U. S. R.* 202. *Reid* v. *Vanderheyden*, 5 *Cowen*, 733.) It is not a defect of parties, but a defect of any right in the plaintiff to sue at all. After introducing the state, or the attorney general, as plaintiff, the action would be dismissed as to the present plaintiffs; for, conceding it to be true that a public and a private injury may be prosecuted in a joint action by the state and an individual, here there is no private injury, and consequently no title of any kind in these plaintiffs. The state can sue whenever it pleases; it may waive complaining altogether. It belongs to the executiv department to determine

when to sue, how to sue, and whether to sue at all, unless quickened by a legislative mandate. (14 *Illinois R.* 446.) Has the judiciary any authority to push it on to its duty? Has a mandamus ever been allowed in such a case? We must admit that the superior court, when deciding against the plaintiffs in the Broadway rail road case, gave leave to amend by bringing in the attorney general as a plaintiff. (2 *Duer*, 670.) But this is a single decision of a single judge, and appears to have been made without argument; and when it is considered how reluctant the judge must naturally have been to dismiss the complaint as groundless, after having committed the whole corporation for its contempt in disobeying the injunction, this novelty is not to be wondered at. Chancellor Kent says that there is a description of cases which "make bad precedents; they excite the passions, and seduce the judgment." (12 *John.* 53.) Perhaps this was one of them. "Bad precedents" should be forgotten, not followed. This looking into the influences which may have disturbed the judicial mind, is sanctioned by the supreme court of the United States in 10 *Peters*, 265, 266. It finds some warrant in the recent most elaborate and judicious opinion of the superior court itself, pronounced by Duer, J., in *Woolsey* v. *Judd*, (11 *How. Pr. R.* 67.) But if (all argument and authority to the contrary notwithstanding) Messrs. Wetmore, Stuart and Hoppock, as tax payers, on the strength of certain precedents in this district, are to be permitted to prosecute on behalf of the people of the state, then we say that, *on the merits*, the people have no cause of action.

We deny that this rail road will be a public nuisance. A modern city rail road is manifestly, in its own nature, only a particular method of paving, or forming a way, and transporting carriages over it. It is not necessarily exclusive, any more than the use of the street by a coach and six, or the division of roads into cart way and side walk. The latter absolutely excludes all vehicles, and even horses, from a part of the road over which, but for such division, they might lawfully pass. The rails may be laid, and the propelling power used, upon a road of given width, in such a manner as to render any other

use of the road impracticable. Perhaps, in point of fact, country rail roads are generally so constructed and conducted. But, on the other hand, it is believed that, in the establishment of rail road transportation upon a highway, the rails may be so laid, the power so applied, and every attending incident of the operation so managed, as not to preclude any class of persons or useful vehicles from their accustomed privileges. If so, the rail car and motive power are mere modifications of the pre-existing use, or the introduction of a new method of accomplishing the precise object of the highway, viz. the transportation of persons and property. Consequently it cannot be a *proposition of law* that the establishment of a rail road in a highway is, *per se*, a diversion of the way to a new and exclusive use. Whether it is so or not, depends upon matter of *fact*. A consideration of these incontrovertible positions will readily account for, and reconcile with principle, most, if not all, of the conflicting decisions and dicta to be found in the books touching the character of rail roads. Some of the anti rail road cases, as they may be called, deserve a passing notice. Judge Gridley, in *Benedict* v. *Goit*, (3 *Barb.* 465,) whilst favoring the new device of a plank road, which many people abominate, says, "A rail road is, in no sense, a public highway. The nature of the road forbids its use by the public in common with the company." For this *obiter dictum*, he vouches three New York cases. If they countenance it, they are borne down by a great weight of authority. *The Seneca Road Co.* v. *Aub. and Roch. R. R. Co.* (5 *Hill*, 170,) is the first. There it was held that a rail road company could not use a turnpike without making compensation to the turnpike company. But the decision is not relevant to the point under discussion. A turnpike road is not a common highway. It is "the company's own, and no person without their consent can lawfully use, incumber, or otherwise interfere with it in any way, except as travelers, on the terms fixed by the act of incorporation." The decision that a rail road company could not take and use such a road *without compensation* was a necessary result of these facts. The next case cited by Judge Gridley, is *Fletcher* v. *The Auburn and Syracuse R. R. Co*

(25 *Wend.* 462,) where a rail road company was held liable for injury to adjacent lands resulting from the lawful use of its road. The case deserves little notice in this connection. The court treated the act of the company in using the road as lawful and regular, and yet held that "consequential injury to *adjacent* owners" gave them a right of action. It is not said by the court nor alleged in the declaration that the plaintiff had any interest in *the road*, or any right to have it kept at any particular grade for the benefit of his "*adjacent*" land, or that the company was guilty of any neglect or misconduct of any kind. But the case was decided on *demurrer*, and the declaration may have contained allegations overlooked by the reporter, and deemed by the court to show a *title* which the company, by raising the embankment, had invaded. The opinion of the court of appeals, delivered by Bronson, J., in *Radcliff's Ex'rs* v. *Mayor*, (4 *Comst.* 205,) shows that this case, as it stands in the report, is not law. Judge Gridley may seem to be supported by *The First Bap. Ch. in Schenectady* v. *The Schenectady and Troy R. R. Co.* (5 *Barb.* 85; *see Reporter's note*, 6 *id.* 319.) This was an action against a rail road company for disturbing a congregation at divine worship on Sunday, by the noise of their cars, engines, whistles, bells, &c. The court says: "The defendants, in creating that disturbance, were engaged in *unlawful* business. The acts of which the plaintiffs complain were clearly within the prohibition of the statute relating to the observance of the Christian sabbath. The plaintiff sustained a pecuniary injury as the result of these unlawful acts of the defendants. In these facts I find all the elements necessary to maintain the action." The ground on which the court went shows the decision to be wholly irrelevant to the general question. One of Judge Gridley's citations, that is to say, *The Trustees of the Presbyterian Society in Waterloo* v. *The Auburn and Rochester Rail Rail Company*, (3 *Hill*, 568,) is a point blank decision that the use of a road by a rail road company's cars is a *private* user. The position is wholly irreconcileable with the celebrated resolution of the court of errors in 18 *Wend.* 77. No notice was taken of the leading

case in 8 *Dana*, 308, decided and published but three years previously, and the only authority cited by the court is its own recent decision, (25 *Wend.* 462,) not then or yet overthrown by the opinion in 4 *Comst.* 205. We do not add to this list of anti rail road decisions the Broadway case of *Milhau* v. *Sharp*, (17 *Barb.* 438,) decided by Mr. Justice Harris at special term; for he expressly decided that a rail road in a city street is not a public nuisance. (*Id.* 444.) And he virtually admits that its establishment would invade no absolute right of the adjacent lot owners, since he puts their whole title to relief upon the fact that the undertaking was illegal, viz. the result of an illegal relinquishment by the corporation of its power over the street. (*Id.* 439.) Any inferences unfavorable to the general proposition above asserted, which might possibly be drawn from the *dicta* and decisions above reviewed, are completely countervailed by an overwhelming weight of authority.

From the line of judicial decisions to which we shall next refer, we claim the following propositions, to wit:

1. A rail road in the public streets of a city or village is not, *per se*, a public nuisance, or an invasion of any private right vested in the lot owners fronting on such streets.

2. Even where a street is not the property of the state or of the municipality granting the privilege to use it as a rail road, and the fee thereof continues in the individual who dedicated or devoted it as a public highway, the use thereof for rails and rail cars, with the assent of the local body having by law the regulation of highways, is consistent with the dedication, and neither a public nor a private wrong.

3. Municipal corporations without any known exception until the act of April 4, 1854, have had power to authorize this kind of use of the public streets. Acts of the legislature requiring their assent in particular cases are rather to be regarded as recognitions of a pre-existing right and manifestations of a scrupulous regard thereto on the part of the legislature, than as grants of a licensing power. (15 *Barb.* 207.) The decisions in support of these three points are so numerous and so controling, that we will refer to them only in a very brief way.

The Lexington and Ohio R. R. Co. v. *Applegate*, (8 *Dana*, 290,) first raised the question how far a city corporation could authorize a rail road company to use the public streets. It contains a full investigation of the question, on the general principles of the common law. The streets of Louisville, Ky. were of such a nature and origin, that the lot owners fronting thereon had in the same "a private right in the nature of an incorporeal hereditament legally attached to their contiguous ground," (*p.* 294,) and there was "no constitutional authority for discontinuing any one of the streets, without making just compensation" to such lot owners for the damage resulting therefrom to their property. (*P.* 295.) The rail road company was incorporated without any special authority to use streets or highways, or any reference to a municipal assent; it was left to acquire the right of way by *ad quod damnum* in the usual manner. (*P.* 290.) With the concurrence of the corporation of Louisville, it located its road through one of the streets of that city, and ran *steam carriages* over the same. On a bill filed by numerous lot owners, the court of appeals, in an able opinion, affirmed the whole of the doctrine claimed in the three points last above stated. (*See pp.* 298, 302, 304, 305, 309.) This was in 1839. In 1841 Chancellor Walworth decided the case of *Hamilton* v. *The New York and Harlem R. R. Co.* (9 *Paige*, 171.) True, he went into no reasoning on the general question, but this only shows how clear of doubt that eminent jurist considered it. True it is, the charter of that company required, and of course authorized, the assent of the common council; (*Laws of* 1831, *p.* 328, § 16.;) but the learned chancellor did not regard that circumstance as sufficiently important even to refer to it. The question was again reviewed upon principle at the New York general term in 1849, before Ex-Chancellor Samuel Jones as presiding justice, who exhausts the whole subject in a lengthy and elaborate judgment. (*Drake* v. *Hudson R. R. Co.* 7 *Barb.* 524. *See pp.* 538, 545–548.) His associates concurred with him; one of them, Edwards, J., delivered a well considered opinion. (*Id.* 556.) A general term of this court, held in 1848, before three very eminent judges, Cady, Willard

and Hand, Js., held unhesitatingly that a rail road established in one of the public streets of a city was not objectionable. (*First Bap. Ch. &c.* v. *The Utica and Sch. R. R. Co.* 6 *Barb.* 316.) See also Judge Strong's opinion to the same effect in *Hentz* v. *Long Island R. R. Co.* (13 *id.* 656.) The whole doctrine of the leading case in 8 *Dana*, above cited, was reviewed, approved and applied throughout to a street in Albany, at a general term held in 1851, Harris, J. delivering the opinion of the court. (*Chapman* v. *Albany and Sch. R. R. Co.* 10 *Barb.* 365.) In *Adams* v. *The Saratoga & Wash. R. R. Co.* (11 *id* 450,) Willard, J., delivering the opinion of a general term, says: "To allow a street in a city or village to be used for a rail road track, either upon its natural surface, or by tunneling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public as a highway for passage and repassage." That was a tunneling case. The learned judge treats the temporary interruption during the progress of the work as trivial and unimportant. He says: "It was not shown that the street will be destroyed or materially injured by the rail road and tunnel, after they shall have been completed. It is a matter of notoriety that rail roads pass through all our great cities and many of our villages, without essential injury to the right of passage by teams or persons. Individuals residing on the street must sustain a temporary inconvenience during the progress of the work; but for this, in the absence of negligence or unskillfulness, the defendants are not responsible." This brings us down to the dispute between the common council and the superior court of this city, during what Judge Morris, in 16 *Barb.* 411, aptly calls the "*the injunction epidemic.*" Even the cases decided during that period all affirm the three positions above stated. (*Milhau* v. *Sharp*, 15 *Barb. per Edwards, P. J.* 208, 210, 211. *Per Strong, J.* 221, 222. *Per Morris, J.* 232.) There is nothing in Judge Harris' special term decision on the trial of this same case, (*Milhau* v. *Sharp*, 17 *id.* 437,) conflicting with these doctrines. He put his decision against the road on the ground of a special defect which he imagined to exist in the grant, viz that

being irrevocable for a term of years, it amounted to an unlawful surrender or transfer by the municipal body of its corporate trust and duty to regulate the streets. (*Id.* 439, 441.) *Milhau* v. *Sharp*, (15 *Barb.* and 17 *id.* 437,) is the Broadway rail road case in this court; the history of its mate in the superior court will be found in 1 *Duer*, 451, in the printed case on the appeal of the aldermen to the court of appeals against the commitment for contempt, and in *Davis* v. *The Mayor*, (2 *Duer*, 664.) See *same case*, (11 *N. Y. Legal Obs.* 359,) and *Att'y Gen. ex rel. Davis et al.* v. *The Mayor &c.* (12 *id.* 17.) On the trial Judge Duer decided, 1st. that the rail road was not a public nuisance; and 2dly, that it was not satisfactorily proven to be an unlawful injury to any private interest of the plaintiffs. (12 *N. Y. Legal Obs.* 17.) Therefore, it will be seen that even in the angry excitement of that day and case, the sound doctrines of 8 *Dana* passed through the fire unscathed. We next come to a case beyond the region of that excitement: *Williams* v. *The N. Y. Central R. R. Co.* (18 *Barb.* 223,) which was decided by a general term in 1854. It was in principle precisely a parallel case with that in 8 *Dana*, and the decision is to the same effect. It is perhaps the more emphatic from the circumstance that the street in question, over which the rail road ran, was owned in fee by the plaintiff and others, and had been by them voluntarily and gratuitously dedicated for a public street or highway. (18 *Barb.* 223, 233, 244, 5.) See also the reasonings of Judge Willard in 11 *id.* 454. We have referred to the case in 8 *Dana* as the leading authority on this subject. We have done so because it was the first case of the sort in this country; because the *rationale* of the matter is so fully gone into; because the complainants had a private right or interest in the street; and because the case is free from any circumstance on which ingenious casuistry could found a distinction to disparage it as the authoritative enunciation of a general common law principle. The case of the Harlem rail road in New York, (9 *Paige*, 171,) has been sometimes impugned, because the legislature had expressly sanctioned an application to the municipal body for its assent. (*Laws of* 1831, *p.* 328,

§ 16.) Like observations, on the same ground, have been made in reference to the Hudson River rail road case, (7 *Barb.* 536; *Laws of* 1846, *p.* 274, § 4,) and perhaps as much might be said in respect to one or more of the other cases in this state. But the case in 8 *Dana* is free from this feature, and so is the case in 18 *Barb.*, with which we close this review.

These very New York statutes expressly authorizing rail roads in cities are legislative declarations of the law. They prove that such rail roads are not nuisances; for "that which is authorized by an act of the legislature cannot be a nuisance." (*Per Hand, J.* 6 *Barb.* 318.) They also recognize the principle that the control and regulation of streets, of right belongs to the municipal government. And it makes nothing against this position that the violence of the rail road war in New York, and "the injunction epidemic" on the bench, forced the legislature to terminate both by that very strong *peace measure*, the act of April 4th, 1854. (*Laws of* 1854, *p.* 323.)

We next insist that the making of the grant in question was an act within the legal competency of the common council. The plaintiffs assert that the common council has only the "*legislative power*" of the corporation, and so far they are undoubtedly correct. They assert that the resolution in question constitutes both a contract and a grant; that all contracts and grants are executive acts, and consequently that a capacity to make them does not vest in a legal entity, which, by the law of its creation, possesses no other than the legislative power. It is not necessary to deny that the resolutions, when accepted, would constitute a grant and a contract, without further formality. Chief Justice Marshall, in *Fletcher* v. *Peck*, (6 *Cranch*, 137,) held that an act of the legislature of Georgia, passed in 1795, *granting* lands to an individual, was a *contract* executed. Chief Justice Marshall, delivering the opinion of the court, treats it as an undeniable proposition that this act was within the legislative power, *unless expressly restrained.* At p. 128, he says: "The only question presented by this demurrer for the consideration of the court is, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands which were the sub-

ject of this contract, *in the manner* stipulated by the contract. In the constitution of Georgia, adopted in the year 1789, the court can perceive no *restriction* on the *legislative power* which inhibits the passage of the act of 1795. The court cannot say that in passing that act the legislature has transcended its powers and violated the constitution." (*See Kendall's case*, 12 *Peters*, 610.) A theoretical reader might think that an act of this kind was not within the "*legislative*" *power*. Indeed, just such a philological puzzle on the import of the word "judicial" divided our court of errors in *People* v. *Mayor*, (25 *Wend.* 63, 64,) and considerably embarrassed another high court, (21 *Maine R.* 555.) But both courts escaped from error, and affirmed the sound doctrine that we must construe phrases as they are used in the practical concerns of life. It is a fundamental maxim of all free governments, that the three great departments should be kept separate. In many of the state constitutions this dogma is elaborately enunciated in a formal declaration of principles. In the constitution of the United States, and we believe in that of every state in the union, the executive and legislative powers are vested separately, the one in a chief magistrate, and the other in a representative body of delegates. Yet at least one-half of the laws of every session of congress and of the state legislatures is devoted to acts operating on particular subjects and in favor of particular persons, in such a way as to constitute, in the theoretical sense before alluded to, an executive act. Acts of incorporation, grants of land, money, &c. and directions for particular works, and an infinite variety of like things, might be instanced to verify these remarks.

It is objected that the common council proceeded irregularly in the adoption of these resolutions. The aldermen hold for two years; the members of the second house in the municipal legislature hold for one year only. This resolution was adopted by the aldermen in 1852, amended and returned to that body by the assistants of that year; and early in January, 1853, after the assistants of 1852 had gone out of office, the aldermen concurred in the amendment, and sent the resolution to the mayor for his approval. He vetoed the measure in January, 1853·

and in November of that year, both boards reconsidered and adopted the resolution notwithstanding the veto. The resolution required the work to be commenced on the first day of "May next." Consequently the resolution, as ultimately adopted, refers to May, 1854; whereas, as they read, *in fact*, when vetoed, they referred to May, 1853. On these facts, a double irregularity is alleged; first, it is said that on the termination of the assistants' year, all business on which they had acted, and which had not received the assent of the aldermen, fell through or became discontinued; and, consequently, that all corporate measures partially matured require to their legality a new commencement in January of each year. Secondly, it is said that the measure vetoed, and that sanctioned by the resolve as ultimately adopted, were not in any legal sense the same, because of the peculiar effect of the words "*May next*," just stated. The first of these objections is founded upon a supposition that the *practice* of the British parliament and of our legislatures in conducting business, adopted for their own convenience, consti tute a *rule of law* binding on them; and that there is an analogy between those bodies and the common council of New York which makes such practice a controlling guide to the latter. We deny that those practices are *law* to the bodies which established them. Like other rules, they may be departed from. We also deny the analogy. The municipal legislature is inferior and subordinate; its duties lie within, comparatively, a very narrow compass. Its members do not come together from remote and distant points, represent interests materially diverse and conflicting, or bring with them different capacities for action arising from circumstances connected with far separated constituencies. In all these respects the common council differs from parliament. congress, and the state legislature. The courts have sanctioned the idea that whatever changes take place in their members, these domestic forums are continuous. In *Coles* v. *The Trustees of Williamsburgh*, (10 *Wend.* 659,) the point was so ruled. A statute required, as an indispensable preliminary to the opening of a street by the village council, that a petition, of a prescribed kind, should be presented to them.

Such a petition was presented and acted on, but ineffectually. A new board took it up and adopted the measure. The court says, at page 665, "The petition *presented to their predecessors* was sufficient authority for them to direct the street to be opened." The separation of the New York corporate body, by forming executive and legislative branches, and by dividing the latter into two chambers, originated in the amended charter of 1830. (*Laws of* 1830, *p.* 125.) This technical question was first raised after the lapse of twenty years. The law committee of the board of aldermen, to whom it was referred, took the opinion of Mr. George Wood, and reported it to the board with their own in conformity. They deemed the boards continuous, and not altered or varied in any respect by alterations in their members. They say that this doctrine "has been practiced since 1831, and is an established custom of the two boards." (*See Document No.* 29, *of the Board of Aldermen for* 1854.) The question had been already examined with a like result by the counsel of the corporation. (*See Proceedings of the Board of Assistants, vol.* 38, *p.* 126; *Supervisors of Chenango* v. *Birdsall*, 4 *Wend.* 453, 460.) After twenty-five years acquiescence and numerous rights probably acquired in good faith on this construction, it would not be very judicious to disturb it. (25 *Wend.* 11, 12.) But let us see how far the analogy contended for exists. The parliament of Great Britain was not originally a continuous body in point of fact. On the contrary, each parliament was convened by the crown, not only by special summons, but for a special occasion, as an advisory body. Its constitution was consequently regarded as being special, and its authority as being limited to the special purpose of the call. This appears from the ancient doctrine that the signing of a single act by the king worked *ipso facto* a dissolution of parliament. The negative of this was not established until as late as A. D. 1620. (2 *Hatsell's Precedents*, 328, 3*d ed.* 4 *Inst.* 28. 5 *Comyn's Dig. Par. Q.* 312. *See act of* 16 *Car.* 1, *ch.* 4. 1 *Stat. at L.* 131.) Parliament was regarded by the king, and, of course, by the judges of his appointment, not as an established institution, but as an occasional resort. Continuity did not

belong to it. It was "a parliament," and not "the parliament," that was formed on each royal summons. Popular liberty has in this, as in most matters of substance, at length triumphed over prerogative. Annual sessions are now the settled usage; and, as the expression is, "annual parliaments" have become a part of the constitution of England; yet the original *intendment* prevails in all the practical forms. Each *session* is still treated as a distinct parliament; it is convened by the king's special summons, and cannot assemble otherwise. (*Dwarris on Stat. p.* 69, 70.) As a consequence, all legislative business not completed at the close of a session is absolutely discontinued and falls to the ground. (*Dwarris on Stat.* 257. 4 *Inst.* 27.) The upper house is a permanent body, and the commons are elected octennially. Consequently, there is no longer reason or propriety in the common phrase "annual parliaments," or in the notion that business must be discontinued by the mere close of a session. They both arise from that subserviency to established forms so common in England. Our congress has repudiated both. The 19th rule of the house provides, that all business left unfinished at the close of the first session may be resumed and carried forward at the second. (*Jefferson's Man.* 138.) It appears that a parliament itself has treated the doctrine of discontinuance as a convenient fiction, for it is disregarded whenever public convenience requires. The final appeal at law and in equity is not to the lords merely, but to the lords "in parliament." It was at first conceived that all appeals and writs of error were discontinued at the close of a parliament. (*Haydon* v. *Gadsalve, Cro. Jac.* 342. *Dethick* v. *Bradbourne, Sir T. Raym. R.* 5. *Crouch* v. *Haynes, Sir Wm. Jones' R.* 66.) But the lords, feeling the inconvenience of the rule in this case, determined that appeals and writs of error should not abate by a prorogation or dissolution. (*Gofton* v. *Sedgwick*, 2 *Levins*, 93. *Prichard's case*, 1 *id.* 165. 5 *Com. Dig. Par. P.* 2, *p.* 311.) The ductility of this mere rule of business is still more strongly manifested in the denial of its applicability to a case of impeachment. The commons are the prosecutors in such cases. Even after conviction, judgment cannot be pro

nounced except upon their motion at the bar of the lords. (*Dwarris on Stat.* 254.) In this form of proceeding they virtually possess the pardoning power, like the prosecutor in the ancient appeal of death. (1 *B. & Ald.* 457.) Yet it is settled law, that a subsequent house of commons may proceed upon a pending impeachment commenced by a previous house. (1 *Dwarris on Stat.* 253. *Earl of Salisbury's case, Carthew*, 132.) So much for the idea of a parliamentary law of England, deducible from the practical rules for the despatch of business, adopted in that country, which, by analogy, should control the action of our city council, under its positive written charter. An answer even more decisive, may be given to the attempt to establish a similar analogy in this respect between our own parliamentary constitutions and the city charter. Neither the constitution of the United States, nor that of this state, nor any of the amended charters of New York, contains any provision bearing directly upon the mode in which, as a general rule, one house shall act upon the resolves of the other. Light upon that point can only be gathered from the provisions concerning the executive assent. The constitution of U. S. art. 1, § 7, sub. 2, provides, that "If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not become a law." The *Const. of N. Y. of* 1821, *art.* 1, § 12, and the *Const. of N. Y. of* 1846, *art.* 4, § 9, use precisely the same language. The *Const. of N. Y. of* 1777, *art.* 3, gave the veto, not to the governor, but to a council of revision, and no aid can be gathered from its provisions. The amended charter of New York, of 1830, (*Davies' Laws*, 201,) contains the following provisions on this subject:

§ 12. Every act, &c. which shall have passed the two boards of the common council, before it shall take effect, shall be presented, duly certified, to the mayor of the city, for his approbation. If he approve, he shall sign it; if not, he *shall* return it, with his objections, to the board in which it originated, *with-*

in ten days thereafter; or, if such board be not then in session, *at its next stated meeting.* The board to which it shall be returned, *shall* enter the objections at large on the journal, and cause the same to be published in one or more of the public newspapers in the city.

§ 13. Such board "*shall, after* the expiration of *not less* than *ten* days thereafter, proceed to reconsider the same. If, after such reconsideration, a majority of the members elected to the board shall agree to pass the same, it *shall* be sent, together with the objections, to the other board, by which it shall be likewise reconsidered, and if approved by a majority of all the members elected to such board, it *shall* take effect."

§ 14. If the mayor shall not return any act, or ordinance, or resolution, so presented to him within the time above limited for that purpose, it *shall* take effect, in the same manner as if he had signed it.

The only thing in this act throwing light upon the meaning of the above reference to stated meetings, is as follows: § 9. "The stated and occasional meetings of each board shall be regulated by *its own* ordinances; and both boards may meet on the same or on different days, as they may severally judge expedient." The amended charter of 1849 (*Davies' Laws, p.* 205) made the following alteration:

§ 6. "If any ordinance or resolution passed by each board, as provided by sections 12 and 13 of the amended charter of 1830, shall not be returned by the mayor within ten days (Sundays excepted) after it shall have been presented to him, the same shall become a law, in like manner as if he had signed it, unless the close of the session of the common council shall prevent its return, in which case it shall not be a law until the expiration of five days after the commencement of *the next session* of the common council, by whom the ordinance or resolution *shall* be reconsidered, if returned within such time, *and be disposed of in the same manner and with the like effect as if presented at the preceding session.*"

There is no alteration in this branch of the law by the amended charter of 1853, except that section 5 requires a two-

third vote to overcome the veto. Section 3 of the charter of 1849 provided that "the common council shall annually hold only three stated sessions, of not exceeding one month each, commencing on the first Monday of January, May and September." (*Laws of* 1849, *p.* 278.) But by act of 1851, this section was so modified as to read, that "The common council shall hold their sessions monthly, commencing on the first Monday of each month; but at no such session shall the members be entitled to draw any per diem allowance for a longer period than eight days." (*Laws of* 1851, *p.* 1001, § 1.) The amended charter of 1853 did not supersede the old board of assistants and let into its place the board of councilmen until January 1, 1854. (*See Davies' Laws*, *p.* 211, §§ 2, 3.) It will be seen that by the constitution of the United States, and of the state of New York, the mode in which the houses should commune (so far at least as this question is concerned) was left to their own discretion. A long interval between the sessions must have been contemplated. It was not to be supposed that, in bodies so constituted, old unfinished business would be resumed after an election of new members to the lower house, and of a large part or the whole of the other. The discontinuance of a pending measure is only provided for in one case, viz. the non-approval of a bill by the executive. Both constitutions provide that an *adjournment* of congress, by which a return within ten days is prevented, shall work an absolute discontinuance. In that case the bill "*shall not become a law.*" The charter of 1830 was adopted in a convention elected by the people, containing some of our most learned and eminent jurists. (*See the Report of its proceedings at large in Kent's N. Y. Charter*, 1*st ed.*) No one can read this charter without perceiving that it was modelled upon our written constitutions. The intent may therefore be gathered as well by observing what they expunged as by perusing what they retained. (12 *Wend.* 318.) It may fairly be supposed that they deemed the former unsuitable. They expressly and *affirmatively* repudiated the idea that the close of a session shall work a discontinuance. The mayor is required to return

the bill to the *next session.* This idea is carried forward and enforced in the subsequent amendments; and besides, it is a matter of history, that our charter has been renewed and amended under a high pressure of party clamor against the corporation, twice since the very question we are now discussing arose in the common council, and was determined adversely to the doctrine of discontinuance. It arose in 1850; the very part of the charter of 1849 most nearly connected with the subject was amended in 1851, and we obtained a new amended charter in 1853. It seems that the people and the legislature approved the principle of unbroken continuity. (2 *Kern.* 231.) So much for any reasoning from analogy to our own constitutions. The comparison affords a conclusive argument against the notion of a discontinuance. If we refer to the detailed provisions of the charter as to the course upon a vetoed ordinance, they are found most positive and peremptory in their directions; they push forward the measure through all the successive steps of legislation, without admitting of any exceptional case. The mayor *shall* return it, the board receiving *shall* reconsider it, and *shall* send it to the other board, by whom it *shall* be likewise reconsidered. If approved on such reconsideration, "it *shall* take effect." The mayor is peremptorily enjoined to send it to the *next* session, though it be in the next year; the body receiving it, after reconsideration, though it be on the last day of the year, are peremptorily enjoined to send it to the other, though the members be all new, and the latter is commanded to reconsider. The language throughout is the most imperative that could be employed. To fritter away these positive injunctions of law by implied exceptions, founded upon farfetched and inapplicable analogies, would not be giving law, but trifling with the clearly expressed will of the supreme law making power. If, as suggested, a board should commit such an abuse as to pick up among the dust and rubbish of by-gone days an antiquated and forgotten measure which had been long previously sent to it for concurrence and approve it, the mayor's veto would correct the mischief. After that the assent of the

first board would again become necessary. Besides, this is an extravagant supposition. The reasonable construction of a law is to be judged of from what would naturally be the usual and legitimate course of action under it. A particular construction is not to be rejected because a fertile imagination can eviscerate from supposable morbid action, a possible inconvenience. It is the duty of each board, as soon as it conveniently may, to act upon and dispose of each measure sent to it by the other for concurrence. A violation of this duty is not to be presumed, and nothing is less likely than a violation to the extent suggested. The very captious objection founded on the words "May next," is easily answered. A legislative act takes effect from the time it receives its final sanction. It speaks from the date of the executive approval, or the approving vote on reconsideration by congress, the legislature or the common council, after a veto. This is the settled law of England and America. (2 *Hatsell's Precedents*, 330, 331, *notes*, 3*d ed.* *Opinions of Att'ys Gen. p.* 1055.) Of course, in its original form, the resolution in question referred to the first day of May next after it should become an operative ordinance. It always meant, and still means, the same thing; the words at all times in legal intendment, pointed to the same result and to the same day. This position is too plain for argument.

The objection that this grant comes within § 23 of the charter of 1849, (*Davies' Laws*, *p.* 209,) scarcely deserves notice. The section provides that all contracts "*for work to be done and supplies to be furnished*," shall be made by the appropriate heads of department. Judge Harris, in *Milhau* v. *Sharp*, (17 *Barb.* 443,) answers this objection. He says: "Nor do I think the resolution a violation of the provisions in the charter which requires that contracts for work to be done, shall be made by the appropriate heads of an executive department. This provision, as I understand it, only relates to contracts which would involve a liability to pay for the work to be done. An agreement, as in this case, to sweep and cleanse a street, not for a compensation to be paid, but as the condition on which the privileges specified in the contract are granted, may, as it seems to

me, very well be made by the common council itself, without the intervention of any of the heads of department." It would be a singularly inconvenient constructive expansion of this section 23, to hold that it restrained the common council from any and every act and measure which might involve any return or recompense to the public in the form of *service* or labor. *Christopher's case*, (13 *Barb.* 568, 569,) was an action to vacate a contract by the common council for work and materials in rebuilding Washington market, to be paid for by the city. The *De Baun case*, (16 *Barb.* 392,) was brought to vacate a like contract for work and materials in paving a street. Both cases went upon the construction of the 23d section. (16 *Barb.* 400.) They have nothing to do with the present argument, save so far as they may be supposed to uphold the hitherto "unheard of" doctrine—as Judge Roosevelt admits it to be—that a tax payer, as such, may file a bill in equity against any public officer or body for a breach of duty or usurpation of power. (*Id.* 401.)

We proceed to a somewhat analogous objection. It is said that the license to form this rail road track, and use it, was "*property*" and "a *franchise*," and should, therefore, have been put up at auction and disposed of to the highest bidder, pursuant to section 7 of the amended charter of 1853. Submitting, against any extremely latitudinarian construction of this provision, the remarks of Mr. Grundy, in *Att'y Gen. Opinions*, *p.* 1254, we claim that this license is neither a *franchise* nor *property*. At a future stage of our argument, we hope to show that it *vested* no interest whatever, being a mere revocable license or permission. If we succeed in establishing that position, it will be conclusive that this section does not apply to this case. The section reads as follows: "All ferries, docks, piers and slips shall be leased, and all leases and sales of public property and franchises," (other than water grants,) "shall be made by public auction and to the highest bidder who will give adequate security." "All persons acquiring any ferry lease or franchise under the provisions of this act, shall be required to purchase at a fair appraised valuation

the boats, buildings and other property of the former lessees, actually necessary for the purposes of such ferry." (*Davies' Laws*, 211.) In considering the application of this statute, it becomes important to ascertain what is intended by the word franchises, as here used. *Ferries* are franchises, as that word is commonly used and understood, although properly it is the *toll*, or, still more precisely speaking, the right to take it, which constitutes the franchise. (2 *Black. Com.* 38. 3 *Kent's Com.* 459. 11 *Peters*, 639. 1 *Burrill's Law Dict. Franchise*, 515. 2 *id. Toll*, 988. 7 *Comyn's Dig.* 458, *title Toll, C. F. E. Heddy* v. *Wheelhouse, Cro. Eliz.* 558.) The corporation of the city of New York, by *Montgomerie's Charter*, § 15, (*Davies' Laws relative to the city, p.* 117,) has authority to "set up" and "establish" *ferries*, and to let and sell the same; but it has no power to create any other franchise. True, it may grant license to keep a tavern, (*Dongan's Charter*, § 10; *Montgomerie's Charter*, § 25,) and this being in some sense a *monopoly*, might be called a *franchise;* but so might the privilege to keep a stall in the public market, to be a public cartman, porter, or hackdriver; but these things have never been called or deemed franchises. They differ substantially from franchises in several respects. These persons are not *bound* by force of their licenses to prosecute the business and maintain suitable accommodations. They can, at any moment, abandon their occupations. (2 *Hilliard's Abr.* § 2, *ch.* 8, *div.* 7.) Persons pursuing these employments are not commonly entitled by law to demand and receive any particular *toll* or *profit* for their wares or services; and herein is the very essence of a *saleable franchise.* They must make their own bargains, or sue on the *quantum meruit;* nor does this latter consideration lose much of its force from the fact that innkeepers are sometimes compelled to accommodate travelers, and not allowed to charge above certain rates. The privilege to have a fair or market, unaccompanied by any toll or other profit, could hardly be called a franchise. (*Cro. Eliz.* 558.) If it could, the idea of selling it at auction to the highest bidder would hardly find place in a sane mind. The power to hold markets is given to the corpo-

ration, but not to grant or lease to others the right of holding them. (*Montgomeries' Ch.* § 17.) This and many other *franchises* are held and possessed by the corporation; but ferries are the only franchises that it can either create or *grant* to others. The various detailed provisions of this section (*Am. Ch. of* 1853, § 7) show that the legislature used the word franchises in reference to *ferries* only, and the circumstance that the corporation had no power to create or let or sell *any other franchise*, conclusively so limits it. The license to lay down rails is not a franchise; it is a mere burthen. These rails, when laid down, are not to be in the exclusive occupancy of the grantees. Any one else who has a suitable carriage may ride on them or over them. Cartmen actually do so, to a great extent, preferring them to the other part of the street. It may happen, as a matter of fact, that others will not have suitable carriages; it may happen that the mayor will not license other hackmen to use such carriages as could run upon them; and it must be admitted that no private gentleman could make a carriage for his own or his family's use, and run over them, except out of a spiteful and malicious desire to intrude, which would be actionable on common law principles. (17 *John.* 98.) But all this does not prove that the licensees have a *franchise* within even the general signification of the term. These are mere incidental circumstances. When there was but one licensed innkeeper or hackman in the city, neither of them possessed franchises, even though there was employment for no more, and it would, consequently, have been a violation of official duty in the authorities to license another. Probably this purely elementary discussion ought not to be pursued. The question is not what may amount to a franchise, but what is a franchise, "within the meaning of this act." (19 *Wend.* 12, 13, *and cases cited.*) Words used by the legislature are to be taken according to their signification in general use. (2 *Zabriskie's N. J. R.* 368, 369. 2 *Kernan*, 198, 199.) If we should concede that any proper definition of a *franchise*, which can be framed, would embrace a licensed porter, cartman, hackman, or butcher, (11 *Peters*, 639; 15 *John.* 379,) the question would still remain

are such things franchises within the meaning of this act? In every elementary work in which franchises are enumerated or classified—and such books abound—an answer will be found in the negative. Rail road companies are generally incorporated. Corporate existence is a *franchise.* They commonly exercise the eminent domain in taking lands for the use of the road. This is a franchise. They may be authorized to take a specified "*toll.*" This is a *franchise.* But a private joint-stock unincorporated company, which assumes the burden of paving part of the street, or to fit it for use by their carriages, and is then licensed to run its carriages over the same, does not thereby acquire a *franchise,* in any sense in which the term was ever used; much less within the sense of the words in a special act imposing restraints upon a corporate body, which cannot create or sell any other franchise but a ferry. The idea that this grant was *property* in the sense of this section, requires but little notice. The privilege of paving the public street certainly was not public property granted to the defendants. An owner who agrees with a builder for the erection of a house upon his land, confers no property or title upon the latter. What then is granted? Certainly not a toll from passengers; for the defendants are not authorized to receive any thing; they have merely stipulated *not* to charge *more* than five cents. And if they were, there is no right to such toll vested as *property,* in the corporation. These defendants are allowed to run their cars, provided the mayor will license them. Is this property? If it is, every cartman takes a portion of the public property when he receives his annual license. We will notice, in connection with this notion of the license being *property,* two other objections. 2 *R. L. of* 1813, *p.* 424, § 198, enacts, "that in all cases of persons meeting each other in any street or road of the city, in carriages, wagons, carts or sleighs, each person shall go to that side of the street or road on his right." It has been said that "every person meeting a rail car going in the opposite direction must move wholly out of the way of the car, and the car is not obliged to be turned out of the direction marked by its track." And hence it was argued and

decided in the superior court that here was the grant of a franchise, viz. of the privilege of not turning out as others would have to do. Here again a mere accidental circumstance, which might or might not ever happen, is made to enter altogether too deeply into the legal nature and constitution of this grant. There are many answers to all this. First *non constat*, that such a meeting would ever take place. If it did, the common carriage owner, unless drunk or crazy, would be acting willfully and maliciously. (5 *Barb.* 338, 339.) Such conduct was not anticipated by the common council, nor did they intend to give, nor did the defendants contemplate receiving, an exemption from the five dollar penalty imposed by this statute, if indeed perchance circumstances should ever arise entitling any one to recover it. Nothing of the kind is expressed: it cannot reasonably be implied. Besides, it was quite within the competency of the common council to regulate the use of the streets so that these rail cars and carriages should not meet, and thus prevent the arising of a case to which this statute could apply. *Montgomerie's Charter*, § 14, authorizes the common council, by ordinance, from time to time, to declare "how and after what manner and order," "all artificers, inhabitants and residents of the said city, and their factors, servants and apprentices, in their business, shall use, carry and behave themselves." By section 16 it gives the common council like authority to appoint, order and direct the *making* and laying out of all streets, lanes, alleys and highways, in such manner as they "shall think or judge to be necessary or convenient for all inhabitants or travelers there." In the exercise of this discretionary govern mental authority the corporation has formed side walks, and from time to time extended or narrowed them as it saw fit. The common right given by law to all equestrians and charioteers to use the whole street was not invaded by this act. What is to prevent the corporation from subdividing in a greater degree the public streets, as improvements in the means of locomotion and transportation may suggest. Suppose the center of the street were assigned to one description of vehicles, and that center subdivided so that those going in different direc-

tions should never meet, what would be the objection. Such is, in fact, the rail road system. Why might not all other vehicles be compelled to adopt a similar rule, all going south to keep to the west of the central portion, all going north to keep to the east of it. Under such a regulation of the public streets, this *section of the statute would* never come into play, and never could be violated. The common council are not to be pronounced offenders or usurpers of power, merely because they have pulled out the fangs of a penal statute by rendering infractions of it impossible. It may be said such regulations cannot be made. A little cool reflection will show that they are in substance made by the city rail road system. He who would run his carriage against the front of a rail car, which could not move from its position, would not involve the car owner in the penalty, and would be liable to a civil action for his willfulness and malice. The statute regulating travel on highways, &c. in the country afforded a better pretext for this very sharp little cavil. It enacts that when persons traveling in carriages shall meet, they shall "seasonably turn their carriages to the right of the *center* of the road." (1 *R. S.* 695, § 1.) But the courts gave even to these strict words a liberal and benign construction, which would forbid any one from running against a rail car. (*Smith* v. *Dygert*, 12 *Barb.* 615. *Jaquith* v. *Richardson*, 8 *Metc.* 216.) The New York city statute is better worded, and leaves the corporation fully at liberty to adopt the ancient method, or so much of it as may seem to be embraced in the rail road system.

Another objection is, that the grant in question is an attempt by the corporation to restrain the future exercise of its legislative powers over the streets—a delegation of its authority—a putting away or parting with the same. This is the precise ground of Judge Harris' special term decision, in *Milhau* v. *Sharp*, (17 *Barb.* 439.) He calls it the "fatal difficulty." "If it could be regarded as a mere revocable license," he says, "the case would be relieved from this fatal difficulty." Judge Strong, Judge Bosworth and Judge Duer, have all given their assent to this idea. It is rather oddly put. All concede that

the legislative power of the common council cannot be bartered away; and that it will remain, whatever they may do. No one contends that, expressly or in so many words, they professed to relinquish it, or that the relinquishment, if formally made, would be effectual, or would present any impediment to the future exercise of their powers. No reason is given why it should be construed as an irrevocable grant, except the prejudice which would result to the grantees, if after they had finished the road the license should be arbitrarily revoked. It should be observed, however, that it would not be an *arbitrary* revocation if the public good required it; and the grantees being chargeable with knowledge of the law, must be presumed to have known that whenever the public good required it, the license would be revoked. They took the hazard of a change of policy in the municipal legislature, and would have no right to complain, on the die turning up against them. True, the common council might judge unwisely and revoke without good cause; but of this also the grantees were aware, and knowingly incurred the risk.

The limitation of a number of years expressed in the license amounted to nothing. "Unless the common council should see fit to change its policy," was a term implied. Licenses to innkeepers, cartmen, porters, &c. are all expressed to be for a year, but they are all revocable at pleasure. (5 *Cowen*, 496.) The grantees of these rail roads take their licenses subject to revocation. The courts had only to say *valeat tantum valere potest*, it is well enough as long as the legislative will of the common council shall approve this manner of managing the public street. Some judges have thought, however, that because such a construction might mislead ignorant grantees, it must not be adopted. They say the licenses, as mere licenses, would be valid enough; they cannot operate as grants; but, nevertheless, they are grants, and being grants in *fact* and not grants in *law*, they can't be any thing else; so they are not even licenses, but are utterly void. The conclusion of Judge Harris at special term, in *Milhau* v. *Sharp*, (17 *Barb.* 439,) is the opinion of a single judge, and not a conclusive authority. In the same case, when heard at general term in *this* district, (15 *Barb.*

219,) Edwards and Strong, Js. concurred in the decision, Morris, J. dissented. Judge Strong alone assented to this point of irrevocability. (*Id.* 228, 229.) Judge Edwards placed his opinion on a different ground. In this court, no judgment of a general term, nor any two concurring opinions in the same case, affirm this point of irrevocability. Two judges have expressed that opinion, to be sure; but Edwards and Morris, Js., who sat with Judge Strong, both withheld their assent to it. Prior to the new organization of the courts, the contrary doctrine was well settled, upon authority. Several years ago the corporation entered into a solemn covenant with Britton, Carnley and Townsend, employing them to clean the streets for two years at a specified price. Within one year the common council revoked the employment, and assigned the duty to others. The contractors brought their suit, and this court at a full term, (August, 1844,) held the arrangement to be revocable in the legislative discretion of the common council. The same doctrine had been repeatedly held before that time. (5 *Cowen*, 542. 7 *id.* 604. *Id.* 352.) It is submitted that the weight of authority in this court, and the reason of the thing, are against the plaintiffs on this point. Two judges of the superior court, in the Broadway case, have affirmed this point, and, in the form of a bill in equity, have exercised the jurisdiction to restrain usurpations of power by the municipal corporation of New York. In the first place, *equity* has no jurisdiction to vacate or annul corporate acts void upon their face; as these grants must be, if void at all, on this ground. (3 *My. & Cr.* 97. 9 *Paige*, 390. 26 *Wend.* 136.) In the next place, a proceeding at common law *in this court*, by action or information, in the nature of a quo warranto, is alone applicable to such a case. (*See the strong language of Chan. Kent in Att'y Gen.* v. *Utica Ins. Co.* 2 *John. Ch. R.* 390, 391; *S. C.*, 15 *John.* 378, 387–390.) The power to restrain excess of jurisdiction in corporate bodies, is peculiarly the province of this court; we submit that the superior court manifestly transcended its powers and jurisdiction in the case referred to, and that its opinion is not only without authority as persuasive evidence of the law, but absolutely *coram non judice* and void

(*Brahe* v. *Pythagoras Ass'n, How. Pr. R.* 44, 45.) We will present one single other consideration on this point of irrevocability, and then dismiss it. The ground taken is, that a franchise or an usufructuary interest in Broadway is the subject of the grant; and it is claimed that this is *irrevocably* granted. Each of these interests is what is termed in the law an incorporeal hereditament. (2 *Black. Com.* 21. 3 *Kent*, 403.) Judge Cowen says, in *Baker* v. *Braman*, that such an interest "cannot pass, even at common law, without a *deed*." (6 *Hill*, 48. *Shep. Touch. by Preston & Hillard*, 229, *note* 4.) As these interests cannot vest without deed, a parol grant of them can only enure as a license or consent, which, of course, is revocable at the will of the grantor. The grant in question does not in any way interfere with the power of the mayor to license carriages. It authorizes them to run their carriages, subject to various provisions, each enjoining some duty on the grantees. One of these is, "Provided that the said cars shall be licensed by the mayor." It says to them, unless you can get a license from the mayor, you cannot act under this grant. It is absurd to call this an interference with the mayor's official functions. There is not to be found in this resolution a single quality or capacity of the company which is not legally admissible in, and practically well enough adapted to, a voluntary trading association; nor one which is peculiar to, or characteristic of, a corporate body. The special provision for the control of a majority is common in partnership agreements, and perfectly valid. (*See Perkins' Collyer on Partnership*, §§ 197, 198, 223, *and cased cited in notes.*) A provision making the interest of a partner transferable to his representatives on death, or to his assignees, and requiring the business to be continued for their benefit, is not uncommon, and is perfectly valid. (*Perkins' Collyer*, §§ 9, 119, 223. 3 *Kent*, 56, 57, *and notes. Chapel* v. *Cadell, Jacob*, 537.) A clause of expulsion in case of delinquency, is also common. (*Perkins' Collyer*, § 233.)

These are the only provisions which have been objected to. They are not subject to just criticism; and if they were, it is manifest that their invalidity would have no effect to impair the

grant. *Utile per inutile non vitiatur.* "But whether this is so or not," says Judge Harris, in 17 *Barb.* 443, "these provisions cannot vitiate the grant itself."

In discussing the legal character and practical operation of city rail roads, we have shown that their establishment does not create an exclusive use of the street, and have thus answered the objection on that score.

Ill faith is imputed to the common council in not making the grant to Lynch and his two associates, on their offer to pay $40 per annum for each car used, and to charge no more than three cents to each passenger. This, it is said, would bring a large revenue into the city treasury, besides furnishing to the citizens cheaper accommodations. We deny that any thing of the kind would have resulted from a grant to Messrs. Lynch & Co. The common council had no moral right to establish this rail road, unless it was calculated to be "good, useful and convenient for the inhabitants and travelers" on Manhattan Island. (*Charter*, §§ 14, 16.) Having arrived at an affirmative conclusion on that point, it became their duty to facilitate and *secure* the construction of the road. As all alterations of the existing state of things are opposed by some whose peculiar interests, passions or prejudices are interfered with, so this design met with violent opposition. (*See the strong remarks of the court in Dudley* v. *Cilley*, 5 *N. Hamp. R.* 562; 7 *Mass. R.* 166; 16 *Pick.* 220.) No evidence was given of the ability of Lynch & Co. to carry through the enterprise, except some *hearsay* evidence that they might be worth, in the aggregate, about one-tenth of the sum required for the purpose. Upon this state of the proofs, it is said that the defendants have not shown ill faith, or inability on the part of Lynch & Co., or that they were opponents of the measure. If this were true, we object to the attempt to shift the *onus probandi*. The common council have, in the due exercise of their legislative power, adjudged it to be an offer "*not fit*" to be accepted. On that we may repose. (*Att'y Gen.* v. *Cohoes Co.* 6 *Paige*, 134. *Lord Cottenham, in Frewin* v. *Lewis*, 4 *Myl. & Cr.* 255.)

Having disposed of this lengthy budget of exceptions, it only

remains to draw the attention of the court to the act of April 4, 1854. Immediately after the grant in question, the plaintiffs brought this suit, and obtained a preliminary injunction, restraining the defendants from constructing that part of the road which is located on Greenwich and Washington streets. Although not actually deprived of power to construct the part located on the Ninth avenue, the unfavorable season, and considerations connected with the existence of the injunction, induced the company to defer commencing the work until spring. They commenced the road on the first of April, 1854, and progressed steadily onward in its construction until they reached the territory covered by the injunction. About one half of the road has been built. On the 4th of April, 1854, the legislature enacted that "the common councils of the several cities of this state shall not hereafter permit" rail roads to be constructed in the streets or avenues, without the consent of a majority in interest of the adjacent lot owners. (*Laws of* 1854, *p.* 323.) The 3d section reads as follows: "This act shall not be construed to prevent the construction, extension, or use of any rail road, in any of the cities of this state which has already been constructed *in part;* but the respective parties and companies, by whom such roads have been *in part* constructed, and their assigns, *are hereby authorized* to construct, complete, extend and use such roads, in and through the streets and avenues designated in the respective *grants, licenses,* resolutions or contracts, under which the same have been so *in part* constructed; and to that end the grants, licenses and resolutions aforesaid *are hereby confirmed.*" A substantial portion of the road in question had been constructed when this act became a law. It would seem, therefore, that whatever might otherwise be the legal conclusion in this case, this confirmatory act has removed all difficulty, and given to the grant in question an impregnable legal basis.

Soon after our general statute, authorizing rail road companies to incorporate themselves by voluntary act, the legislature of Illinois adopted a statute, entitled, "An act to provide for a general system of rail road incorporations." The provisions of the act were modelled upon those of the New York law; but

there were many deviations from the model. These gave rise to an opinion which prevailed extensively and led to much litigation, that a special act was requisite to the creation of each corporate body. *After judgment* in an inferior court upon a quo warranto filed against a company which had assumed corporate powers under the general law, the legislature passed an act authorizing it to construct its road, declaring it to be a valid and subsisting corporation under its articles of association, and that its acts and proceedings "*hitherto*" were valid and binding On writ of error, the supreme court of Indiana, per Treat, C. J. held as follows: "It is not necessary to determine whether the defendant had authority to construct the road in question by virtue of" the general statute. "Even if it possessed no such authority under that law, ample power has been given it by subsequent legislation. Referring to the confirmatory act he says: "This act removes all the difficulty in the case. If the company had not the right originally to construct the road, the legislature has expressly conferred it. If there were defects in its organization, they are clearly cured by this act. If the company had forfeited its franchises, the state has waived the forfeiture. This court has now no power to declare a forfeiture for any cause existing prior to the passage of this act, as the state alone may insist upon or waive a forfeiture." He concludes, as we trust your honor will conclude: "It is manifestly the duty of this court, to leave the company to prosecute the enterprise to its completion." (*People of Illinois* v. *The Miss. and Atlantic R. R. Co.* 14 *Illinois R.* 446.)

A new set of objections start up at this stage of the case; but they are easily disposed of. Here is the assent of the supreme legislative power. This has been held in all the cases sufficient to justify a rail road in a city street, even where the fee of the street was in private individuals; and that, too, without providing for compensation to the fee holder. The act refers to "*common councils*," and thus shows an intent to ratify *their* "resolutions" establishing rail roads, thus disposing of all objections founded on the supposed necessity of action by the executive department.

In their printed points, the plaintiffs say, that the exception in the third section was not intended to avoid the effect on these cases of the seventh section of the charter of 1853, requiring property or franchises to be sold at public auction to the highest bidder; and could neither have been intended to "waive or legalize any such frauds" as these corporation grants of rail roads for prices below what could have been obtained under offers actually made. It was perfectly notorious, for years before the passage of this act, that these rail road grants were all made by corporate resolution, and not by public sale to the highest bidder. They were all publicly impeached in our courts, on that account. It was equally notorious that in every instance the opponents of the road got up a counter-proposition tendering terms, apparently more advantageous: for rejecting these, as an alleged breach of trust, the common council was in each case impeached in the courts, and to some extent successfully. These things must have been known to the legislature; such is the presumption of law. (1 *Caines*, 180.) It was to put an end to these vexatious contests that this peace act was passed by the legislature, affirming all that had been done, and regulating the future. The plaintiffs' own printed points contain an admission of this. They say, the exception in the third section was obviously intended to relieve certain rail roads, (such as the 2d, 3d, 6th and 8th avenue rail roads,) then in existence, against the prohibition of the two first sections." That very Second avenue rail road had been stayed by an injunction on *all the same grounds* of objection which were made in the Broadway case, and are now made in the present. (*Stuyvesant* v. *Pearsall*, 15 *Barb.* 244.) So the pretended breach of trust and illegality were both intended to be waived *in that case*, by the plaintiffs' own admission; must not the same words have the same effect in this case?

It is said that this act is void, because it violates *Art.* 3, § 16 of the constitution, which provides that "no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in its title." This is not a private act certainly; neither can it be called local; for

it embraces all the cities in the state. A law regulating or applying equally to all places or persons of a large specified class, is not local or private. An act regulating auctioneers is a public act; an act regulating all towns, or all villages, or all cities, or all creeks, lakes, rivers, streams, farms, or roads, cannot be deemed in any sense *local*. Besides, this provision of the constitution is incapable of being enforced by the courts, and must be regarded as merely advisory to the legislature. It exists in many state constitutions, and is very little attended to. It is emphatically a law of imperfect obligation.

The assertion that this act creates a corporation by special act, and therefore violates *Art.* 8, § 1 of the constitution, is unfounded. It neither creates, nor professes to create, a corporation. And if it did, the prohibition against creating corporations by special act contains two exceptions, either of which would embrace the present case. *First.* It is "for municipal purporses;" and *secondly*, the legislature is authorized to proceed by special act whenever, "*in the judgment of the legislature*, the objects of the corporation cannot be attained under general laws." In the original draft of this section, as presented to the constitutional convention of 1846, the question of practicability to effect the object by general laws, was left open. This would have enabled the courts to annul an act of incorporation after extensive interests and complicated business relations had come into being under it. The mischievous effects which might result from the existence of such a power were perceived, and the spe cial committee of five, to whom the whole subject and all propositions connected with it were referred, reported the section in its present form. Hon. A. L. Jordan, since attorney general of the state, was a member of the committee, and the words "*in the judgment of the legislature*," were inserted on his motion. (*Convention Jour. pp.* 1211, 1213, 1227.) It is a most judicious provision. We have only to say, in conclusion, that what the constitution has expressly confided to the judgment of the legislature, the courts cannot rejudge.

This brings us to the last of these objections. It is a bold one; but it can readily be disposed of. It is said that the grant

to the defendants was absolutely void when made, and that a *void* thing cannot be set up by a *confirmation*. (*Co. Litt.* 301, *Shep. Touch.* 311, *div.* 3.) This is a common law rule of conveyancing, applicable to the deed of a private person; and even, as such, having a very narrow sphere of practical operation, if indeed, in strictness, it has any at all. The word "confirm" is sufficient in a grant, so the deed which cannot enure as a *confirmation*, will take effect as a *grant*. But this rule of conveyancers' practice, existing at the common law, imposes no restraints upon the legislature. Like every other rule of practice, it may be changed by the law-making power. "It is competent," says the court, in 6 *Hill*, 48, "for the legislature to create an exception both to the common law rule (of conveyanc ing) and the statute of frauds."

The plaintiffs contend that this rule is binding upon the legislature, because they find it applied in England to *crown* grants. There is no analogy. The crown of Great Britain can neither make, nor dispense with the law. The legislative power is in the king, with the lords and commons in parliament. (2 *Selden*, 539.) The plaintiffs need not to have gone as far as *Coke upon Littleton* for an authority on this point. *Jackson* v. *Adams*, (7 *Wend.* 367,) is directly in their favor; but the error of that decision is very palpable. See precisely the opposite doctrine ruled, and its foundation distinctly stated by the supreme court of the United States, in *Fairfax's Devisee* v. *Hunter's Lessee*, (7 *Cranch*, 622, 631.) The case cited from 14 *Illinois R.* 446, is against the plaintiffs on this point.

S. B. Strong, J. The plaintiffs are owners in fee of lots and buildings—Wetmore and Hoppock severally on Washington street, and the Stuarts on Greenwich street—all south of and below Reade street. They respectively claim to the center of the street opposite to their lots. They are tax payers to a considerable extent in the city of New York. They complain that the defendants threaten and intend to construct a railway through the two streets, their entire length, and extending through the Ninth avenue to Fifty-first street, under an alleged

grant from the common council of the city, by resolutions purporting to have been adopted by the board of assistants on the 20th of December, 1852, and by the board of aldermen on the 5th of January, 1853, and subsequently on reconsideration, after the mayor's veto, in November and December of the latter year. The plaintiffs aver that the grant is invalid, and that they have a right to prevent its operation, as tax payers, as proprietors of lands which it is proposed to devote to a new purpose without allowing them any compensation, and as persons who will sustain a special injury by the construction and proposed use of the railway; and therefore ask for an injunction restraining the defendants "from entering into, or upon, Greenwich and Washington streets, for the purpose of laying or establishing a rail road therein, and from digging up or subverting the soil, or doing any other act, in these streets, tending to incumber them, or to prevent the free and common use thereof, as the same have been heretofore enjoyed." The defendants in their answer deny that the plaintiffs are the owners of the soil of the streets mentioned in their complaint, or any part thereof; but they allege that the ownership is wholly vested in the corporation of the city. They aver that the corporation had power to make the grant in question, and that it was correctly made; and they state in a supplemental answer that "they actually commenced the construction of the proposed rail road, prior to the 4th of April, 1854, and that before that day the said road was in part actually constructed in conformity to the resolutions of the common council," and that on that day the legislature of the state passed an act ratifying, confirming and establishing the grant to them; and they admit that they were constructing, and claim that they have the right to complete, and use, the proposed rail road. The judge before whom this action was tried at the special term, decided that the construction of the proposed road along the streets where they passed the plaintiffs' lots, would inflict serious private injury upon the plaintiffs, in unduly obstructing them in approaching to their respective places of business adjoining upon such streets, amounting in effect to a private nuisance to them, unless the grant is

valid; but he also held that the grant was legal and valid, and that the defendants should not be restrained from proceeding with the construction of the road; and he therefore dissolved a preliminary injunction which had been granted, and gave judgment for the defendants. An appeal from his decision has been brought by the plaintiffs, and is now before us for our determination.

It is entirely clear that suits for the redress or prevention of public wrongs, where there is no pretense of injury to individuals in their private capacity, can be maintained only by, or in the name of, the people. Where, therefore, individuals, without invoking the aid of the public, call upon our courts for protection, they must show that their private rights are endangered. The principle is too clear to need any illustration, and too well supported to require the citation of any authority. In speaking of public wrongs, I do not intend to include such as may be sustained by corporators by the mismanagement of their corporate funds or property, by their officers. These are included in the class of private wrongs. Their officers act in the capacity of trustees, and their conduct as such is subject to the rules applicable to individuals. It is not a matter in which the people of the entire state in their collective capacity have any interest. If the proposed grant to the defendants in this case is of a franchise in the streets, that would unquestionably be property belonging originally to the corporation; and if the grant is improvident, and involves a breach of trust, it would for that reason be invalid, as much so as if it had emanated from individuals in their private capacity. Then, too, the plaintiffs as corporators, and therefore the beneficiaries, would have the right in behalf of themselves and their associates, to impeach the transaction. In the case of The Mayor, Aldermen and Commonalty of the city of New York *v.* Britton, (pamphlet report,) Chief Justice Nelson says that in the case of *Bailey* v. *Mayor &c. of New York*, (3 *Hill*, 531,) it was held that "the grant of the legislature authorizing the city to furnish the inhabitants with pure and wholesome water, by means of the Croton aqueduct, was the grant of a special private franchise made as well for the private emolument and advantage of the

city as for the public good, and that the defendants, *quoad hoc*, were to be regarded as a private company, and to be dealt with accordingly; that they stood upon the same footing, in this respect, as would any person or body of persons upon whom the like special franchise had been conferred." I retain the opinion which I expressed in the case of *Milhau* v. *Sharp*, (15 *Barb.* 230,) that these grants of permission to construct, and in a limited manner use, railways in the city, are in terms grants of franchises. The resolutions in this case purport to convey to the grantees, and, as I conceive, to them exclusively, the right to run cars upon the rails, for the conveyance of passengers, subject to the provisions therein specified; and they provide that the joint stock association which may be formed, "shall have the control, management and direction of the road, and the business thereof." It was insisted on the argument that the resolutions in question cannot operate as the grant of a franchise, because they are not under seal. But when a grant is by an act of legislation, and not by individuals, pursuant to it, a seal is unnecessary. There is no limitation of the time for which the grant is to endure, nor is there any express power of revocation. If such a power can be implied from the character of the trust devolved upon the corporation by its charter, that would not deprive what is granted of its character as a franchise, while it continued. I do not intend to say that it is competent for the corporation to grant to individuals a franchise in the use of the public streets; I only speak of these resolutions as they read. If the grant would have been valid according to its plain import, provided it had been made in good faith, it seems to me that the plaintiffs can assail it for unfaithfulness in the administration of a trust, not in their character of tax payers, for that would include non-resident owners of real estate, but as beneficiaries or *cestuis que trust*. But it is a serious difficulty in their way in this particular, (and one which relieves me from considering the question of good faith in the common council,) that the judge who heard the evidence on this subject has decided that no breach of trust was proved. So grave a charge ought not to be lightly inferred, but to be of any avail

should be affirmatively and clearly sustained by the evidence The charge was, that more advantageous offers were rejected by the common council, but the judge says that a better *bona fide* offer is not proved to have been made. In an equity case we are not, it is true, concluded by the verdict of a jury or the decision of a judge on questions of fact; but upon a full examination of the evidence, I am satisfied that the judge came to a correct conclusion upon this question. The plaintiffs cannot, therefore, avail themselves of this alleged ground to sustain their action.

The allegation of the plaintiffs, that the defendants propose to take their respective lands for the track of the road, is not sustained by the proof. Their titles to the lots claimed by them were not admitted in the answer, nor were the conveyances to them produced in evidence on the trial. There was proof of possession of the lots and buildings adjoining the streets by the plaintiffs, or under them, as owners; but there was no direct evidence of their possession of any part of the streets in front of their lots, except of the vaults, for which they had respectively made compensation to the common council, to which body they had applied for permission to construct them. In the country the possession of land adjoining a public highway is justly deemed some, although not conclusive, evidence of the possession of the adjoining half of the road, subject to the easement. Ordinarily the owners of the land devoted to public use, in the rural districts, retain some right in the soil—all the private rights which may be compatible with the free and unobstructed exercise of the public privilege. Thus they have the exclusive right to the pasture and the wood, which are frequently of considerable value. The existence and the common exercise of the right raise a presumption in favor of the adjoining proprietors. It is but a presumption of fact, however, and may be rebutted. In cities, the pristine or (if there be any such) the existing owners of the strata of the streets cannot exercise any acts of possession, for their individual benefit, over the devoted soil. The many uses to which it may be appropriated preclude that. They have not, therefore, any pos-

session which can raise a presumption of title. Especially is this true in a city, where the title to the land, in a great portion of the streets, is vested under the provisions of law in the corporation. If, however, there was any presumption of title in the plaintiffs, by reason of their possessing the lands adjoining the streets, that would be fully met by their admission of title in the corporation, implied by their application for permission to construct vaults under the half of the streets adjoining their lands, and paying a compensation for the privilege. I do not deny but that if the plaintiffs had proved that the title to their lots had emanated from those who at the time had owned the beds of the streets, and their deeds had bounded the property by the streets in general terms, their title would have extended to the center. The vendor could have had no inducement to retain any title to the portions of the streets fronting the lots and buildings of other proprietors; and besides, as a street boundary may be the margin or the center, the construction most favorable for the grantee might be applied, which would carry him to the more capacious boundary. That is the rule where the conveyance is between private individuals, acting in reference to their own property. It is different when the state is a grantor; and I am inclined to think that it is inapplicable where the grantor is a corporation, holding the lots for private and the streets for public purposes. There the boundary of the private property by that held for public purposes would apply to the dividing line between the two, the same as when one lot is bounded by another. If a vendor has no title beyond the adjoining margin of a highway, and bounds the grantee by the highway, in general terms, with a covenant of seisin, it would be no breach of the covenant that his title did not extend to the center of the highway. If, therefore, the plaintiffs had traced their titles back to their corporation, and the corporation had, in the original conveyances, bounded the lots by the streets, I think that they would not have thereby established their claims to any part of the adjoining streets. If, however, the plaintiffs had clearly proved that their titles extended to the center, the value of their interest would have been merely

nominal. The public would still have a right to engross the use, to the exclusion of the enjoyment of any private right, so long as the public easement should continue; and as there is no probability of a discontinuance, the right of reverter would be worthless. It is for this reason that when the corporation demand, and acquire by legal proceedings, the absolute title to the lands dedicated by the owners to the public for streets, a nominal compensation only is awarded. (*In the matter of Thirty-second street*, 19 *Wend.* 198. *In the matters of Twenty-ninth and Thirty-ninth streets*, 1 *Hill*, 189, 191.) If, then, the prosecution of the proposed measure had been for a purpose to which the lands claimed by the plaintiffs had not been previously devoted, they would not have been entitled to an injunction to protect an interest of merely nominal value; more especially as they could have obtained ample redress after the actual infliction of the injury. But the use of the street for a railway would not vary its primary designation. It was designated principally for a pass-way, and a railway furnishes an improved method of locomotion. The late Judge Jones says truly, in *Drake* v. *The Hudson River R. R. Co.* (7 *Barb.* 508,) that "the said road, with its cars propelled by the application of steam, or by animal power, is a new mode of using the street, but still it is a use of it for passing and repassing through it with vehicles for the carriage of passengers, and of goods and freights; and the use of the streets by cars with passengers is equally within the acknowledged right thus to traverse the streets with carriages, as the use of them by other vehicles for similar purposes." If, therefore, the plaintiffs had any title to the lands in the streets, their property will not be used for any purpose other than to pursue previously acquired privileges, and they are not entitled to any compensation, nor, of course, to an injunction, for the reason that no compensation has been awarded to them. If the objections which I have been considering had been originally valid, they would not have been cured by the confirmatory act of April 4, 1854. The legislature may, as some suppose, (although I do not,) possess despotic power, except where the people have been so fortunate

as to restrict it by their organic law; but that contains a restriction broad enough to prevent the enactment of an effectual law to sanction the breach of a private trust, or to prevent private property not only from being taken, but from being in effect annihilated, without a fair and just compensation to the owners. It is, however, unquestionably competent for the legislature to relieve a measure from any objections exclusively of a public character. That would of course be no infringement of private rights; and the rights of the people in their collective capacity are generally subject to legislative control. If, therefore, the resolutions in question exceeded the power conferred upon the city legislature, in authorizing the construction of the proposed railway at all, or in creating or conferring upon private individuals a franchise which would constitute a monopoly in the public streets, and which would in effect violate a general provision in the law of the state for the benefit and protection of travelers, or in restricting the common council in their power to regulate the streets, or in authorizing the creation of a public nuisance, irrespective of its effects upon the rights of private individuals; or if the common council, in making the grant, assumed executive or administrative powers which had been expressly denied to them; or if the resolutions would interfere with the power conferred upon the mayor, to license carriages; all these being, as was truly said by the counsel for the defendants, "objections with which no private individual has any concern, and of which the state alone can complain," were effectually released by the confirmatory statute, and which, so far as it relates to these matters, the same learned counsel very properly denominated "a peace act."

The remaining objection is, as I view it, of a much more formidable character. It is that these alleged resolutions were never adopted by the common council—that they were never legally passed. That the two boards, in what they passed in this matter, acted in their legislative capacity, I do not entertain a doubt. Whether it is considered as a simple regulation of the streets, revocable at any time, or as a grant of

franchise, it is still a legislative act. The delegation of legislative power to the common council is in general terms. It is limited, of course, by the constitution and laws of the state, but neither restricts it in the particular which I am considering. As the statute gives no definition of the term, it must be understood and interpreted according to its ordinary signification. The practice of the constituting power may always be considered, and should have controling weight in the interpretation of its own language. Now it has ever been the practice of our legislature to confer franchises, and even to convey lands to individuals, by legislative acts. If a principle like this needs confirmation, it has it in the case of *Fletcher* v. *Peck*, (6 *Cranch*, 137,) which was cited by the defendants' counsel. I do not think that it was decided otherwise by our court of appeals in the case of the *People* v. *Sturtevant*. It is difficult to say how far the court intended to go in that case. The only point necessarily decided was, that if those proceedings of the common council purporting to authorize the construction and use of railways were legislative acts, they were not so far exempt from judicial interference that an injunction restraining legislative action was void, or could be safely disregarded. That was enough for the determination of that case, and whatever else was said in the opinion of the learned judge was an *obiter dictum*, and no doubt would be so considered by him in any subsequent case. The common council, in the years 1852 and 1853, consisted of a board of aldermen and a board of assistants, who together possessed and wielded the legislative power of the corporation. There could be no act of the common council without the co-operation of both boards. The term board, as applied to those bodies, may have two meanings—one abstract, having reference to the legislative creation, which is continuous; and the other referring to its members, in which latter and more important sense it is changed by every new general election. The members, of course, constitute the board for all purposes of action; and when powers are to be exercised, the members legally assembled can alone act. Legislation, to be effectual, must be performed by the two boards

who together constitute the common council. Now, as an acting body, the common council of 1852 was not the common council of 1853, because there was an entire change of the members of one of the constituted bodies—the assistants—on the 1st of January, 1853. The resolutions in question were not passed by the common council of 1852, as they were not then adopted by the board of aldermen, nor by the common council of 1853, as they were not then adopted by the assistants. It is not pretended that the resolutions were passed in 1852. They were not passed in 1853, because the assistants of 1852 and the aldermen in 1853 could not, in the latter year, coalesce so as to form one common council. The members of the two boards are the legislative representatives of the corporators, and their acts in that capacity are considered as the acts of the corporation. They derive their efficacy from the principle of representation. They are representatives only during their official term. Who, then, were the legal representatives in 1853? Most assuredly the then existing aldermen and assistants, and no act could be passed in that year without their co-operation. But if the procedure in this instance was valid, an act might be passed, not only without the co-operation of the two existing boards, but in opposition to the views of the members of one board, by whom it had never been approved, or even considered. The legislature might have authorized this anomalous procedure; but it has not done so, certainly not in direct terms, nor, as it seems to me, by inference. The provision in the amended charter of 1849, "that when the mayor is prevented from returning an ordinance or resolution of the common council by the close of its session, it shall not be a law until the expiration of five days after the commencement of the next session of the common council, by whom the ordinance or resolution shall be reconsidered, if returned within such time, and be disposed of in the same manner and with the like effect as if presented at the preceding session," has reference to the same council by whom the ordinance or resolution was originally passed, and not to one whose members had been changed. That construction is supported

by the direction that the ordinance or resolution shall be reconsidered at the latter session. Reconsidered by whom? Certainly not by those who had never considered it before. But if the provision may apply to a newly elected board, it is special, relating simply to a reconsideration of a measure by the two existing boards, and can be extended no farther—certainly not so far as to violate a principle of representation. The case of *Coles* v. *The Trustees of Williamsburgh*, (10 *Wend.* 659,) simply decides that where a petition is necessary to any act of a municipal corporation, one presented to a former board will authorize their successors to proceed. That may very well be, as the presentation of the petition was a perfected act, so far as it related to the subscribers. Nothing more was to be done by them, and as to them it mattered not to which board it was presented. That has no reference to the case where the conjoint action of two constituent bodies is requisite to make it the action of the composite body. The delegation of legislative powers to the common council, as it was constituted in 1852 and 1853, was by statute. The Dongan charter, it is true, recites that "the city of New York is an ancient city, and the citizens of the said city have been anciently a body politic and corporate." That was not enough, however, to show that it was a corporation by prescription; nor could it have been such, as sufficient time to make it such under the English law, had not elapsed since the discovery of the continent. If, however, it had been a corporation by prescription, the division of the common council into two boards was by statute and of modern date. The principles which control this new institution are such as are applicable to recent enactments. In such cases the grant to the corporation cannot be explained, and most assuredly its powers cannot be created, by usage. In ancient grants, and especially when expressed in obsolete phraseology, usage under them may be resorted to for explanation, but never, even in such cases, to establish additional powers. That the common council may have adopted a practice conformable to what was done in this instance, and pursued it for a period of twenty-five years, if

it had been fully proved, which it has not, would not have shown that it was legal, or within the compass of their powers. Their legislative powers were not derived from usage, but were acquired wholly under the statute. In all such cases, if there are express statutory definitions, they must control; but if there are not, any power conferred must be taken with its ordinary qualities and incidents. That is the reasonable rule, and it has been established by authority. What then was the rule, in the particular which I am considering, in legislative bodies consisting of two branches? In England, when there was an election of a new house of commons, the unfinished business pending in the preceding parliament was at an end. There was never an instance where a bill adopted by the house of commons, only, of one parliament, was taken up by the house of lords and finally passed without the concurrence of the newly elected body. The rule has been extended to prorogations, and where the same houses re-assembled. Blackstone says, (*Com. vol.* 1, *p.* 186,) that "prorogation puts an end to the session, and then such bills as are only begun, and not perfected, must be resumed *de novo* (if at all) in a subsequent session." Jefferson says, (*Manual*, § 61,) "Parliaments have three modes of separation, to wit: by adjournment, by prorogation or dissolution by the king, or by the efflux of the term for which they were elected. Prorogation or dissolution constitutes there what is called a session, provided some act has passed. In this case, all matters depending before them are discontinued, and at their next meeting are to be taken up *de novo*, if taken up at all. An adjournment, which is by themselves, is no more than a continuance of the session from one day to another, or for a fortnight, a month, &c. *ad libitum*. All matters depending remain in *statu quo*, and when they meet again, be the term ever so distant, are resumed, without any fresh commencement, at the point at which they were left." (1 *Lev.* 165, *Lex. Parl.* c. 2. 1 *Rolle's Rep.* 29. 4 *Inst.* 7, 27, 28. *Hutt.* 61. 1 *Mod.* 152. *Jac. L. Dic. tit. Parliament.*) He subsequently remarked, that "when it was said above, that all matters depending before parliament were discontinued by the determination

of the session, it was not meant for judiciary cases depending before the house of lords, such as impeachments, appeals and writs of error. These stand continued, of course, to the next session. (*Raym.* 120, *Jac. L. D. tit. Parliament.*) Impeachments stand, in like manner, continued before the senate of the United States." It is stated in a note, "that it was held in the case of Hastings, that a dissolution did not work the discontinuance of an impeachment." Impeachments are like indictments, and when once preferred, they remain pending before the courts until they are decided; so, too, the house of lords acts as a court in hearing and deciding appeals and writs of error, and is then governed by the same rule of procedure. But the action of the house of lords, when sitting as a court and acting alone, furnishes no rule for governing their conduct when acting in their legislative capacity, where the concurrence of another body is requisite. Bacon, in his abridgement, (*title Court of Parliament, F.*) says, "the diversity between a prorogation and an adjournment or continuance of the parliament is, that by the prorogation in open court there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must, at the next assembly, begin again;" "but if it be only adjourned or continued, all things continue in the same state they were in before the adjournment or continuance." The practice of the English parliament, when acting legislatively, has been uniformly followed by the congress of the United States, by the legislature of this state, and, so far as I know, by the legislatures of all the other states. In all these bodies, when there has been a new election of either branch, the unfinished business of their predecessors is considered as absolutely discontinued, and if taken up at all, is acted upon without reference to what has been done before. Why is not this rule applicable to the common council of New York? Can a power delegated to them be taken without the restrictive incidents which enter into its definition? And above all, can it be supposed that when a superior body confers some of its own power upon an inferior one, it designs to go beyond its own limits? I am satisfied that this rule of action in all legis-

lative bodies must govern and control the common council of New York in their legislative proceedings. The supposed resolutions in question were therefore null and void when presented to the mayor for his consideration. The subsequent action of the two branches was not, therefore, upon the reconsideration of a previously adopted ordinance. If it could have any effect it would have been as an original or a new enactment. In that view it was ineffectual, as it was not subsequently presented to or approved by the mayor. In fine, what was attempted to be done was neither a grant, license, resolution or contract of the common council, or, in fact, of anybody. It was not, therefore, confirmed by the "peace act" of April 4, 1854. It was not embraced in its terms, nor could it have been the design of the legislature to complete the unfinished business of the common council, or of either of its branches. The resolutions in question had been adopted but by a single board in any year, or during the existence of any one common council, and were not, therefore, at any time the act of the entire body. If such resolutions are characterized by what they are, and not by what they are designed to be, a confirmation of the acts of the common council would not reach them. In this point of view it is unnecessary to consider the question discussed at the bar—whether a nullity from inherent defects can be confirmed by an act of the legislature? Or, another question, whether the legislature, having devolved the power of regulating the streets upon the common council, can resume it without the consent of the inferior body, legally expressed?

Connected with the objection which I have last considered, are the questions whether, by the construction or use of the proposed rail road, the plaintiffs would clearly sustain a serious special injury which would produce a public nuisance; and if so, one peculiar to themselves, by the noxious procedure. I agree to what appears to be the predominant judicial sentiment in this state, that an authorized rail road in a city is not a public nuisance. When the principal act is sanctioned, that legalizes the temporary obstruction to the public caused by the prosecution of the appropriate work, and would prevent any

effectual action by individuals on account of any consequential injury—although it might be peculiar to them—which should necessarily result from it. But it is otherwise when the rail road is constructed without the requisite authority; then the obstructions, at least in removing the pavement and laying the rails, would be unjustifiable, and as they would necessarily be considerable, they would amount to a public nuisance. If the injury would be confined to travelers, (and by that term I intend to include all who use the street simply as a passway,) the people alone could sustain an action for its reformation or prevention. In order to enable individuals to maintain a suit for prevention in their own behalf, it must be apparent that the injury of which they complain will ensue, and will be peculiar to themselves. The apprehended deleterious result must be reasonably certain, and not merely possible or even probable. Thus if one threatens to dig a pit, or deposit a log in the highway, an individual cannot obtain an injunction to prevent the nuisance because he is in the habit of riding in that part of the highway in the night, and he or his horse will probably sustain a fall; not even if it should be near his dwelling house. The danger might be imminent under such circumstances, but not certain, and it would also be one which he would share with the traveling public, and would extend no further than to what might be incurred in the use of the street simply as a passage, and the greater probability or extent of the apprehended injury by reason of propinquity would not change its character from public to private. The judge who tried this action found substantially that the plaintiffs would sustain special injury by the obstruction, to the access to their stores. This apprehended grievance is not one of those particularly specified in the complaint. It is included in the general charge that the proposed work would, if prosecuted, be specially injurious to them. The rules of good pleading would seem to require greater particularity; but if the complaint was defective in that particular, the defendants should have moved for an order upon the plaintiffs to reform it, or at any rate should have objected on the trial to the introduction of evidence to support a charge not

sufficiently specified. As they did neither, it is too late for them to raise it now. It must be considered as having been waived, especially as it was not even mentioned in the argument of the defendants' counsel, who never omits raising an available, or even plausible, point in behalf of his client. The judge's conclusion that the access to the plaintiffs' buildings on the nearer side of the streets through which it is proposed to construct the rail road, seems to be warranted by the evidence, and indeed was not seriously controverted on the argument. But the defendants' counsel contended so strenuously and ingeniously that this apprehended injury would not be special and peculiar to the plaintiffs, that it produced considerable doubt in my mind whether I had not been mistaken in the opinion which I had expressed to the contrary, in the Broadway rail road case. (*Milhau* v. *Sharp*, 15 *Barb.* 230.) I there say, "if the grant is void from the want of adequate power to make it, or indeed invalid from any cause, the plaintiffs as proprietors of buildings on Broadway, would be peculiarly and seriously injured by an attempt on the part of the defendants to construct the proposed railway, and they would be entitled to an injunction to prevent evils for which they could obtain no adequate redress in the law" My examination of the subject since the argument of this case has dissipated the doubts which were then created, and led me to a resumption of my former opinion. The injury in this case is not to the passage along or across the street from one part to another, which is a public privilege, but to the access from the street to the plaintiffs' buildings, which is a private right, in which the public does not share. An interruption to such access would inflict an injury upon the owner peculiar to himself, in which others have no concern. It is true that the number of sufferers in this instance would be very great, but that would not prevent any of them from obtaining individual redress. It might be a valid reason for including as plaintiffs in one action numerous persons who have no joint interest, for the purpose of averting a threatened evil from a common cause affecting them all. The injury, if inflicted, would be direct, and not remotely consequential. and the difference is very essential Thus,

if a serious obstruction should be created in the mouth of the Mississippi, it would to some extent impair the access from the ocean to the lands of the riparian owners on that noble river. But, then, the injury would be consequential to the interruption of a public privilege, and not directly acting upon a strictly private right. The public privilege of passing from the ocean into the river would be alone invaded, and that would not furnish a valid cause of action to individuals to whom the consequences might prove injurious. That distinction would prevent or render innocuous the "shower of subpœnas" in suits instituted by the successive riparian proprietors, to which allusion was made by the defendants' counsel. The decision of the court of appeals in the case of *Gould* v. *The Hudson River R. R. Co.* (2 *Seld.* 522,) does not overrule this doctrine. I say the decision because that applied to the questions actually involved, and was not necessarily accordant with all the remarks of the learned judge who expressed an opinion in that case. The question in that case was, whether an owner of land on the banks of the Hudson river could maintain an action against a rail road company for damages sustained by him, in being deprived, by an embankment, of his access to the river. The court held that the action could not be sustained, because the damages resulted from an obstruction authorized by the statute organizing the rail road. But if that is good law, it by no means follows that the action would have failed if the obstruction had been unauthorized by the legislature. The owner, it is true, would sustain a damage whether the *causa causans* was sanctioned by legislation or not, but if it resulted from a lawful cause it would be *damnum absque injuria.* I cannot suppose that the court of appeals intended to decide, nor do I believe it to be law, that the owner of land adjoining a highway, by land or water, has not a private right of access to it, (and if there is such a right it must necessarily be private, as the public cannot share in it,) or that damages caused by an interruption to it by an obstruction unlawfully interposed are irrevocable.

Upon the whole, I am satisfied that the project for the proposed railway was never legally adopted by the common council

and that its pursuit, if tolerated, would inflict some serious injuries upon the plaintiffs, in which none but the proprietors of the land adjoining the streets through which it is designed to construct said railway would participate, and that, therefore, the injunction for which they ask should be granted.

The judgment at the special term should be reversed, and an injunction should be awarded pursuant to the prayer in the complaint.

I am not inclined to allow any costs.

Roosevelt, J. Messrs. Wetmore, Hoppock and Stuart, inhabitants of this city, and also owners of property on Greenwich and Washington streets, complain that the defendants, under the name of the Ninth Avenue Rail Road Company, and under color of a pretended grant from the city authorities, are about extending their rails through those streets, in front of the plaintiffs' premises, to their great injury and annoyance, and in violation of their rights. An injunction granted in the first instance, on their application to restrain the proceeding, was subsequently, at special term, dissolved and the complaint dismissed. From that judgment the plaintiffs have appealed, insisting that the injunction originally issued, instead of being dissolved, should be made perpetual.

On the part of the defendants, it is not pretended that *every* citizen has a right to lay a rail track in the streets of the city. The corporation, however, it is claimed, may do it; or, in their discretion, by a resolution of the common council, may grant the privilege, as a franchise, to a particular individual or association of individuals. Such a grant, it is alleged, has been made in this instance. The judge so held at special term. He placed his final decision on that ground. And the question therefore is, can a resolution, adopted by the board of assistants in one year, be concurred in by the board of aldermen in another year, so as to make it, without consulting the existing board of assistants, an ordinance of the common council? Or must it, as in the case of unfinished business in other legislative bodies, be taken up *de novo*? When the charter of 1830

declared that "the legislative power of the corporation of the city of New York should be vested in a board of aldermen and a board of assistants, who together should form the common council of the city," it must be considered as having adopted by implication, so far as applicable, the universally recognized principles of *legislative* bodies, constituted of two independent branches. The settled practice and understanding—indeed, we may say the common law—of such bodies, as illustrated in the congress of the United States, the legislature of this state, and, it is believed, in the legislatures of every state in the union, as well as in the parliament of Great Britain, repudiates the idea that the board of aldermen of 1853 could take up and pass the resolution of the politically deceased board of assistants of 1852, and give it effect as law, without consulting the newly elected body, it might have been, although not so in the present instance, on the express ground of opposition to the particular act of their predecessors, and for the express purpose of preventing its consummation.

No case has been cited, in which the senate of a state, or of the United States, or the upper house of Great Britain and Ireland, has attempted to give effect to the inchoate action of a previous assembly, house of representatives or house of commons, whose term had expired and whose places were filled by others newly chosen in their stead. To allow an opposite practice in the legislation of the city common council since its new organization, would be at times to defeat the will of the constituents, clearly expressed through the regular channel of the ballot-box, and to render the elective franchise a nullity. Although the corporation of the city is a continuous body, the common council, since its division into two branches, is not. Its legal term, like that of the state legislature, upon whose model it was formed, is one year, and no longer. The common council of 1852 is not the common council of 1853. The resolution, therefore, set up by the defendants as their justification, although passed by *a* board of aldermen and by a board of assistants, was not a resolution of the *common council*, and as a consequence, was not confirmed by the state law of April 4th, 1854.

The primary object of that act was to prevent the common councils of cities from permitting the construction of rail roads in the streets of cities, without the consent of a majority of the property owners immediately interested; and when it excepted, from its operation, rail roads already "constructed in part," it meant those constructed under lawful authority, and not under "grants, licenses, resolutions or contracts" which had never been made, given, passed or entered into according to the charter, and which, therefore, having in judgment of law no existence, could not be "confirmed." The confirmation intended was a confirmation as against the state, and not against the common council itself. An opposite construction of the act, instead of restraining the common council from permitting injurious rail roads, would go to sanction roads commenced in violation of law, and which had never been permitted at all. Having had, therefore, no warrant for its commencement, and none for its continuance, the road in question, under the evidence, is not only a public nuisance, but a public nuisance of which the plaintiffs have a legal right to complain as specially injurious to them in their ingress and egress to and from their places of business on the street. Such a nuisance, it is well established by numerous decisions, can and ought to be restrained by injunction, if demanded, as in this case, by the parties specially aggrieved.

The judgment therefore of the special term, we all agree, should be reversed, and a perpetual injunction awarded.

CLERKE, J. For the reasons above expressed in Judge ROOSEVELT'S opinion, I concur in the conclusion at which both my associates arrived.

Judgment reversed.

[NEW YORK GENERAL TERM, September 8, 1856. *S. B. Strong, Roosevelt* and *Clerke*, Justices.]

THE PEOPLE, *ex rel.* J. B. Debenetti, *vs.* MOSES D. GALE, clerk of the marine court.

The right of appeal from the marine court of the city of New York to the common pleas was not taken away by the act of July 21, 1853, in relation to the marine court.

But such an appeal can only be resorted to after an actual determination has been made by the marine court at a general term. WHITING, J. dissented.

An appeal does not lie to the common pleas from a judgment rendered by a single judge of the marine court. If such an appeal is taken, it will confer no jurisdiction upon the common pleas; and the judgment of the marine court at special term being thus left in full force, it is the duty of the clerk, when applied to, to issue execution upon it.

A performance of that duty may be compelled by a mandamus issuing out of the supreme court. WHITING, J. dissented.

MANDAMUS to compel the defendant, as clerk of the marine court in the city of New York, to issue an execution upon a judgment of that court.

ROOSEVELT, J. An order was made in this case, directing a mandamus to the clerk of the marine court to compel him to issue an execution on a judgment rendered by one of the judges of that court. The clerk objects that the judgment, although regularly rendered by the marine court, had been regularly reversed by the court of common pleas. The relator, on the other hand, contends that the reversal was a nullity; that the common pleas, in that stage of the proceeding, had no jurisdiction; that an appeal from the single judge of the marine court could only be taken, in the first instance, to the *three* judges of *that* court, and afterward, if at all, to the common pleas.

By the act of July 21, 1853, the jurisdiction of the marine court was greatly enlarged, and, as a consequence, it was deemed proper, at the same time, to provide additional safeguards for the correctness of its judgments. An appeal was accordingly given from any judgment "entered by the direction of a *single justice*," to the "*justices* of the same court at a general term." And the justices were authorized to appoint such general terms,

that is, terms to be held by more than a single judge, "at such times as they deem proper."

The first question presented is, was this appeal, or, more properly, rehearing, in the same court, intended to supersede, not the occasion merely as it ordinarily would, but the right to appeal to a higher court? For it will be remembered that by the code, as it then stood—and there has been no express alteration—it was declared (sec. 34) that the common pleas should have "power to review the judgments of the marine court." A jurisdiction thus clearly given—and, as it appears to me, so fit and proper in itself—could only be taken away by express words or necessary implication, neither of which exists in this case. How, then, is this revisory control of the common pleas to be exercised? The act of 1853, as well as the fitness of things, as it seems to me, clearly answers this question. It places the marine court, in reference to the common pleas, upon the same footing precisely as that upon which the supreme court stood in reference to the court of appeals. No appeal lay from the supreme court to the court of appeals, (*Code*, § 11,) until at least three judges of the former court had been consulted, and until at least two, at general term, had made an "actual determination" of the controversy. The act of 1853, in providing for an appeal from one to three justices of the marine court, declares that the appeal shall be taken "in the same manner and with the like effect as appeals in the supreme court from the decision of a single judge to the general term." One of the "effects," in the supreme court of an appeal from a single judge to three or more judges of the same court, is, as we have seen, that it enables a dissatisfied party—and is an indispensable preliminary—to obtain a review not only in the same court, but in another court. It was the only "manner" in which a party could carry his cause from the court below to the court above. He was required—for that clearly was the object of the legislature—to exhaust the functions of the one court before he resorted to the other. And why, we may ask, should the legislature, in creating general and special terms in the marine court, have deviated from the uniform policy of our judicial system? I say uniform

policy, because the rule contended for had been adopted not only in the organization of the supreme court, but in that of all the other courts in the city. The court of appeals, says the code, (sec. 11,) shall have exclusive jurisdiction to review upon appeal every actual determination *made at a general term*, by the supreme court, or by the superior court, or by the court of common pleas. No appeal, it will be seen, is allowed in any of these cases from one court to another court, until the judgment of the single justice of the subordinate court at special term has been affirmed or reversed by his brethren at general term. But this is not all; although there is no right of appeal in any case from either of the three named courts to the court above, before the action of the general term, there is a right of appeal from all of them in every case after such action. Why, when extending the system of general and special terms to the marine court, should the marine court, I repeat it, be made an exception to the otherwise universal rule? Why should not all proceedings thereafter, to rehear or review, as to that court, be conducted "in the same manner and with the like effect," as in the case of all the other courts in the district in which the organization of general and special terms existed?

It has been suggested, as a difficulty, that by the terms of the code, which prescribe the mode of appealing from inferior courts to the common pleas, an appeal from a general term of several judges would be impracticable. The notice of appeal, it is true, according to the code, must be served "on the justice or on *his* clerk," the return must be made by the "justice," and the appellate court "may compel *him* to make the return," &c. But where is the difficulty in substituting the plural for the singular number in these cases? Is it not an amendment, or rather an adaptation, necessarily implied in the act of 1853? The revised statutes had already declared, and if they had not, the progress of common sense would have dictated the same interpretation, that where the singular number is used, the plural, if necessary, shall be deemed to be included. But the same chapter of the code which requires the service of an appeal on "the justice," in the singular number, equally requires its ser-

vice on "the respondent" in the singular number. How then, upon the strict principles contended for, could there be any appeal, even from a single judge, if the party called to respond to the appeal consisted of the plural instead of the singular number? In regulating the costs also, there is a certain sum given to "the appellant," on reversal, and to "the respondent," on affirmance; both, like the term "justice," nouns in the singular number.

Our conclusions are:

First, That the right of appeal from the marine court to the common pleas was not taken away by the act of 1853.

Second, That such an appeal can only be resorted to after an actual determination made by the marine court at a general term.

Third, That the appeal in the present instance was therefore premature, and gave the common pleas no jurisdiction; and that the judgment of the marine court at special term being thus in full force, it was the duty of the clerk, when applied to, to issue an execution upon it.

CLERKE, J., concurred.

WHITING, J., dissented.

[NEW YORK GENERAL TERM, June 19, 1856. *Roosevelt, Clerke* and *Whiting*, Justices.]

WILEY *vs.* SLATER.

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Neither the county court, nor the supreme court, can reverse the judgment of a justice of the peace because it is against the weight of evidence.

If there is a disputed question of fact, upon which the case turned before the justice, or in relation to which there was evidence upon both sides, the county court should affirm the judgment, whatever may be its opinion as to the correctness of the justice's conclusion.

But if the judgment is entirely unsupported by evidence, so that it is really against law, the county court should reverse it; and if it fails to do so, it is the duty of the supreme court to correct the error and reverse the judgments of both courts.

In an action to recover damages for alleged injuries to the plaintiff's dog, inflicted by the defendant's dog, whatever may have been the character and habits of the defendant's dog, it is necessary for the plaintiff to prove that he was the aggressor, or in the wrong, in that particular fight. If the plaintiff's dog provoked the quarrel and caused the fight, the defendant, as the owner of the other dog, cannot be made responsible for the consequences.

The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another.

A distinction is to be observed, between keeping a dog who is dangerous to human life, and one who is unwilling to have strange dogs upon his master's premises, and is in the habit of attacking and driving them off.

Owners of valuable dogs are bound to take a care of them proportioned to their value, and to keep them within their own precincts or under their own eye.

It is not a general rule that when two dogs fight, and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog.

APPEAL from a judgment of the Oneida county court, affirming the judgment of a justice. The action was brought to recover damages for alleged injuries to the plaintiff's dog inflicted by the defendant's dog, in a fight, in consequence of which the plaintiff's dog died. The complaint alleged, 1st. That on or about the 29th day of May, 1855, the defendant set his dog upon, and who bit and maimed and greatly injured, the plaintiff's dog, and that the defendant struck, kicked, jammed and injured the plaintiff's dog, so that he died from said injuries, to the damage of the plaintiff of $100. 2d. That on or about the 29th of May, 1855, the defendant's dog and dogs attacked, bit and greatly injured the plaintiff's dog, so that he died. And that the defendant well knew that his dogs were ferocious and

dangerous, and were accustomed to bite and injure other dogs and animals, but still kept, and still keeps, said dog, well knowing him to be dangerous and accustomed to bite. And the plaintiff demanded judgment against the defendant for $100.

The defendant by his answer denied the complaint, and each and every allegation contained therein. And for a further answer, he alleged that, at the time mentioned in said complaint, he heard dogs fighting, and went to them, and amongst them were the plaintiff's dog; and as soon as the defendant saw the plaintiff's dog and the others fighting, he parted said dogs.

At the close of the plaintiff's testimony, the defendant moved for a nonsuit: 1st. On the ground that the plaintiff had not shown that the dog which did the injury belonged to the defendant; 2d. That the plaintiff had not shown that the defendant had knowledge that his dog was accustomed to attack. The motion was denied. The justice rendered a judgment in favor of the plaintiff for $25 damages and $5 costs, and the county court affirmed the judgment. The defendant then appealed to this court.

R. H. Morehouse, for the appellant.

D. C. Stoddard, for the respondent.

By the Court, W. F. Allen, J. 1. If there is a disputed question of fact, upon which the case turned in the court below, or in relation to which there was evidence upon both sides, the county court did right to affirm the judgment, whatever may have been the opinion of that court, or may be our opinion as to the correctness of the conclusion of the justice. The county court, or this court, cannot reverse the judgment of a justice because it is against the weight of evidence. (*Adsit* v. *Wilson*, 7 *How.* 64. *Kasson* v. *Mills*, 8 *id.* 377. *Bennett* v. *Scutt*, 18 *Barb.* 347.) But if the judgment was entirely unsupported by evidence, so that it is really against law, the county court should reverse, and if it fails to do so, it is the duty of this court to correct the error and reverse the judgment of both courts.

Wiley *v.* Slater.

This is the first time I have been called upon to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. I have had occasion to preside upon the trial of actions for assaults and batteries originating in affrays in which the masters of dogs have borne a conspicuous part, and acquitted themselves in a manner which might well have aroused the envy of their canine dependents. The branch of the law, therefore, applicable to direct conflicts and collisions between dog and dog is entirely new to me, and this case opens up to me an entire new field of investigation. I am constrained to admit total ignorance of the code duello among dogs, or what constitutes a just cause of offense and justifies a resort to the *ultima ratio regem*, a resort to arms, or rather to teeth, for redress; whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette entitle the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not, and am glad to know that no nice question upon the conduct of the conflict on the part of the principal actors arises in this case. It is not claimed, upon either side, that the struggle was not in all respects dog-like and fair. Indeed I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate and control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they entered into and became a part of the domestic institution, to settle and avenge, in their own way, all individual wrongs and insults, without regard to what Blackstone or any other jurist might write, speak or think of the "rights of persons" or "rights of things.' I have been a firm believer with the poet in the instructive if not semi-divine right of dogs to fight; and with him would say

> "Let dogs delight to bark and bite,
> For God hath made them so;
> Let bears and lions growl and fight,
> For 'tis their nature to."

It is possible, that had the owners of both dogs been present the belligerents would have been changed and the familiar questions growing out of *son assault desmene and mollite manus imposuit* would have been presented, but no such questions are made here.

The defense is not rested upon the principle of self-defense, or defense of the possession of the master of the victorious dog. Had this defense been interposed, a serious and novel question would have arisen, as to the liability of the offending dog for excess of force, and whether he would be held to the same rules which are applied to human beings in like cases offending; whether he would be held strictly to the proof of the necessity and reasonableness of all the force exerted, under the plea that in defense of his carcase or the premises committed to his watch and care, "he did necessarily a little bite, scratch, wound, tear, devour and kill the plaintiff's dog, doing no unnecessary damage to the body or hide of the said dog."

Addressing myself to the question really made in the case, then, the first difficulty I meet with is the want of proof of ownership by the defendant of the offending dog. The plaintiff made a *prima facie* case, by proving an apparent possession of the dog, but the appearances were entirely explained by the witness Nowell, who testifies that the dog was not owned by the defendant, nor kept nor harbored by him, but was really a trespasser on the premises, being kept at the shop adjoining. Upon the question of ownership there is really no conflict of testimony.

2. Whatever may have been the character and habits of the dog, there is no evidence that he was the aggressor, or in the wrong, in this particular fight. The plaintiff's dog may have provoked the quarrel and have caused the fight; and if so, the owner of the victor dog, whoever he may be, cannot be made responsible for the consequences.

3. There is no evidence that the dog alleged to belong to the defendant was a dangerous animal, or one unfit to be kept. The cases cited, in which dogs have attacked human beings,

although trespassers, and the owners have been held liable, are not applicable. It is one thing for a dog to be dangerous to human life, and quite another to be unwilling to have strange dogs upon the master's premises. To attack and drive off dogs thus suffered to go at large, to the annoyance if not to the detriment and danger of the public, would be a virtue, and that is all that can be claimed, upon the evidence, was done in this case. Owners of valuable dogs should take care of them proportioned to their value, and keep them within their own precincts or under their own eye. It is very proper to invest dogs with some discretion while upon their master's premises, in regard to other dogs, while it is palpably wrong to allow a man to keep a dog, who may or will, under any circumstances, of his own volition, attack a human being. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature or the particular mood and temper at the time, of the dog visited. The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land.

4. The evidence is slight that the dog died in consequence of this fight. I should infer, from the evidence, that he continued his annoying visitations until some one who did not own a white dog with black spots on his head, made use of a shot gun or "Sharpe's rifle," or some other substitute, to abate the nuisance. But as this question is left in doubt by the evidence, the judgment of the justice is conclusive as to the cause of death. I can, however, see no just grounds for the judgment. It can only be supported upon the broad ground that when two dogs fight and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog; and I know of no such rule. The owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor, and this rule would ordinarily be a full equivalent for the loss; and with that

unless the evidence differ materially from that in this case he should be content.

The judgment of the county court, and of the justice, reversed.

[Oswego General Term, July 8, 1856. *Pratt, Bacon* and *W. F. Allen*, Justices.]

Kennedy *vs.* Ray.

The legislature has the power to specify the duties of librarians of school districts, and for a violation of those duties may give an action, and fix the penalty which shall be recovered by the party aggrieved. The inhabitants of a school district may also make such regulations as they think proper, for the government of the librarian; and he is subject to the direction of the trustees, in all matters relating to the preservation of the books.

But in the absence of any regulations or directions touching the rights of the inhabitants, and the duties of the librarian, an action will not lie by a resident of a school district, against the librarian, for refusing to him or his children access to the library, and permission to take books therefrom.

MOTION by the defendant for a new trial, upon exceptions. The substance of the complaint was, that the plaintiff was a house holder and resident in a school district in the town of Cheektawaga, in Erie county; that the school district owned and possessed a large school district library; that by the regulations made, each and every of the inhabitants of the district was entitled to free access to the library, and to take and carry away and read—subject to certain regulations, as to the number of books to be taken at one time, and the length of time the books might be kept—any book or books such person might desire. That in 1849 the defendant was elected librarian and took possession of the library, and has been ever since such librarian. That the plaintiff, at different times, applied to the defendant for books out of the library, and demanded permission to take books, &c. In short, that the defendant refused to let the plaintiff or the plaintiff's minor children take any book or

books from the library. She claimed judgment for $5000 damages. The defendant denied the complaint, and answered new matter, not material to be stated.

On the trial the plaintiff proved that she was a resident of district number four, and paid school district taxes; that the district had a school district library consisting of about 300 volumes; that the defendant was librarian, and had the care, custody and possession of the library, and kept it at his dwelling house. She proved the allegations made in the complaint, of application made by her son, a minor, under her direction, and also by herself, for books, and that the defendant refused to allow her son and the plaintiff to take any book or books from the library, and prohibited their coming upon his premises. There was no proof of any regulations made by the trustees or superintendent or librarian, touching the library. The judge, at the circuit, nonsuited the plaintiff, and the plaintiff excepted. This motion was to set aside the nonsuit, and for a new trial.

Geo. B. Benedict, for the plaintiff.

F. J. Fithian, for the defendant.

By the Court, MARVIN, J. It will be proper to ascertain the position and duties of the librarian, touching the school district library. By statute, the taxable inhabitants of a school district have power, at the district meeting, to raise money by tax for the purchase of a school district library, not exceeding a certain amount each year. The clerk of the district, or such other person as the taxable inhabitants, at their annual meeting, may designate and appoint by a majority of votes, shall be the librarian of the district, and shall have the care and custody of the library, *under such regulations as the inhabitants may adopt for his government.* The trustees of the district are the trustees of the library, and the property of all the books, &c. is deemed to be vested in the trustees. The librarian is made subject to the direction of the trustees, in all matters relating to the preservation of the books and appurtenances of the library,

and he may be removed by the trustees from office for willful disobedience of such directions, or for any willful neglect of duty.

The statute authorizes the state superintendent to frame a set of general regulations relating to school district libraries, and the use of them by the inhabitants of the district, which regulations, it is declared, shall be obligatory upon all persons and officers having charge of the libraries, or using and possessing any of the books from the libraries. An appeal is given to the superintendent by any person aggrieved by any acts or decisions of the trustees concerning district libraries, or the books therein, or the use of books, or from any acts or decisions of the librarian or of any district meeting. (1 *R. S. 4th ed.* 906, 7, 8, §§ 167, 168, 171, 173, 174, 175.)

The librarian is designated and appointed by the district, and he has the care and custody of the library, under such regulations as the inhabitants may adopt for his government. He is made subject to the direction of the trustees, in all matters relating to the preservation of the books. It does not appear in the present case that the inhabitants of the district had ever made any regulations for the government of the librarian, or that the trustees had ever given any directions relating to the preservation of the books; nor does it appear that the superintendent has ever framed a set of general regulations touching librarians. The case is to be considered, then, in its absence of any regulations or directions touching the rights of the plaintiff, and the duties of the defendant. By the statute it is seen that the property of the books is deemed to be vested in the trustees; and they are declared to be the trustees of the library. What relations existed between the plaintiff and defendant? What title and right had the plaintiff to the books in the library? What duty did the defendant owe her? The library was procured for the use of the inhabitants of the district. But to be used, how and where, and under what circumstances? The title of the books was not in the inhabitants of the district, but in the trustees. It seems to me that the rights of the plaintiff, whatever they were, were too imperfect to support an action by her against the librarian. He owed no duty to her, in his of-

ficial character, the breach of which would subject him to an action. He was subject to the directions of the trustees in all matters relating to the preservation of the books. If the plaintiff felt aggrieved she should have applied to the trustees, and they could probably have afforded the proper relief.

In *Spear* v. *Cummings*, (23 *Pick.* 224,) it was held that the teacher of a town school is not liable to an action, by a parent, for refusing to instruct his children. The court say that the proper remedy of the plaintiff was to appeal to the committee, (answering to our trustees,) and they had power to control the teacher; and finally, if there should be found, practically, any danger of an encroachment upon private rights, in a matter in which the whole community have so deep an interest, it is for the legislature to provide more ample and specific security against such danger. So in a case like the present, further legislation may be necessary, or perhaps the inhabitants of the district have power, by suitable regulations, to remove any danger, and to afford proper means of redress; or the superintendents may frame general regulations which may be sufficient to afford redress. The difficulty is that the plaintiff shows no legal rights in and to the books, and hence no legal actionable wrong was done to her. There may be many moral wrongs for which the law affords no remedy. And there may be legal wrongs in which the damages to individuals may be very great, and yet so remote, contingent or indefinite, as to furnish no good ground of action. These questions are ably considered in *Lamb* v. *Stone*, (11 *Pick.* 527,) and in *Spear* v. *Cummings*, (*supra.*)

What damage has the plaintiff sustained by herself and children being deprived of the reading of the books? One might give a large sum for the use of a book to read. It is mental food, often more valuable and more highly prized than the most tempting viands for the palate. But, if one is deprived of this mental food, what is to be the measure of damages? How are they to be estimated? What rule can be laid down as a guide to the jury? The reading of some books is positively injurious. Some read a book for the pleasure it affords at the time, not expecting a lasting benefit. Some children and young per-

sons derive a great benefit from reading books, and others very little. In short, it is impossible to lay down any rule touching the damages which the plaintiff sustained by being deprived of the use of the books in her family. Every thing relating to the damages is contingent, remote and uncertain, and from the very nature of the subject, purely speculative. Such cases may be very proper for legislation. The legislature can clearly specify the duties of the librarian, and for a violation of those duties may give an action, and fix the *penalty* which shall be recovered for the breach of the law. This kind of legislation is not uncommon. The penalty for the violation of the duty imposed by law being fixed, there is no embarrassment arising as to the amount that shall be recovered. The legislature may give the action exclusively to the party aggrieved.

Ashley v. *White et al.* (*Lord Raym. R.* 938) is a leading case, and usually referred to in support of a maxim, that when a right exists and has been violated, the law gives a remedy by action for damages. In that case, it was held that a man who had a right to vote at an election for member of parliament, may maintain an action against the returning officer for refusing to admit his vote. In *Lincoln* v. *Hapgood and others*, (11 *Mass. R.* 350,) it was held that an action would lie against selectmen for refusing to receive the vote of a qualified elector.

It would seem to be impossible, in such cases, to lay down any rule of damages. I have referred to these cases for this reason, and for the purpose of showing particularly the reasons upon which the Massachusetts court proceeded. They are stated in the case referred to, and when the decision was pressed upon the court, in the case against the school teacher, (*supra*,) the court, referring to these cases say, "the principle upon which those cases were decided was, that this is a great personal, political and constitutional privilege, in danger of being frequently and wantonly violated by those in the exercise of power, and that it would be difficult in most cases to prove actual malice, and, *ex-necessitate*, the law allows such action upon considerations of great public policy, to prevent greater mischief. This principle is not applied to the case under consideration, and

cannot be relied upon as a precedent." Much less are those cases authority for sustaining the action in the present case. The nonsuit was proper, and the motion for a new trial should be denied.

[Erie General Term, September 8, 1856. *Bowen, Mullett, Greene* and *Marvin*, Justices.]

22 516
31 96
35 570
38 116
43 228
23a 497
44a 192

Cooper & Peabody *vs.* Dedrick.

In an action upon a guaranty indorsed upon a promissory note, it is not necessary to prove, by witnesses, the signature of the maker of the note. This is sufficiently proved, as against the guarantor, by proving his execution of the guaranty.

Where it is proved that the plaintiffs were partners in business two or three years since, and there is no evidence of any change, or dissolution of partnership, the presumption is that they are still partners.

When a guaranty is written upon a note, and the note is transferred, the sale and delivery of the note with the guaranty upon it, furnishes *prima facie* evidence of a sale of the contract of guaranty. And the possession of the note and the guaranty is *prima facie* evidence of a right, in the holder, to the guaranty, and will authorize him to maintain an action thereon, unless it be shown that the contract of guaranty was not transferred, at the time the note was transferred.

Where a guaranty is expressed to be "for value received," the consideration is sufficiently expressed to satisfy the requirements of the statute of frauds.

APPEAL from a judgment of the Allegany county court, affirming the judgment of a justice.

Angel & Ward, for the defendant.

J. M. Curtiss, for the plaintiffs.

By the Court, Marvin, J. The action was upon a guaranty, written upon a promissory note. The note reads thus: "$58.26. Due Dedrick & Bronson, or bearer, fifty-eight and twenty-six one hundredths dollars, for value received.

J. S. Stillman."

The guaranty is, that "For value received, I hereby guarantee the payment of the within note. February 19, 1849." Signed by the defendant.

The action was commenced August 30, 1854, and tried October 19, 1854. Upon the trial the plaintiffs produced the note and proved the guaranty written upon it, and rested. The defendant asked for a nonsuit, upon the ground that there was no evidence that the plaintiffs were a firm, or in any way jointly interested in the note or guaranty; also, that there was no evidence of the signature of the maker of the note. The plaintiffs then offered further evidence, which the justice received, the defendant objecting. They gave evidence tending to show that the plaintiffs were partners in business two or three years previous to the trial, and again rested. The justice gave judgment in favor of the plaintiffs.

Several objections are made to the judgment. It will not be necessary to state them particularly. It was not necessary to prove by witnesses the signature of the maker of the note. This was sufficiently proved, as against the defendant, by proving his execution of the guaranty. (*Cowen & Hill's Notes, notes* 168, 869, 912.)

The evidence of a joint interest in the plaintiffs was sufficient, *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with them as partners, and had settled with them, as such, some two or three years since. There was no evidence of any change or dissolution of partnership, and the presumption was that they were still partners.

As to the evidence of their title to the guaranty, the note was payable to Dedrick & Bronson, or *bearer*, and the guaranty was written upon it. The possession and production of the note was *prima facie* evidence of title in the plaintiffs, and as the guaranty was upon the note, in my opinion, the possession of the note and the guaranty were *prima facie* evidence of right in the plaintiffs to the guaranty. Since the code, the real party in interest is to bring the action. The old question, therefore, whether the form of the contract justifies the action in the name

of the plaintiffs, no longer exists; but the question is has the plaintiff the title or right to the contract or the cause of action. If he has, he may maintain the suit, upon the contract, in his own name. In my opinion, when a guaranty is written upon a note and the note is transferred, nothing being said touching the guaranty, the contract of guaranty passes with the note. In other words, the sale and delivery of the note with the guaranty upon it furnishes *prima facie* evidence of a sale of the contract of guaranty. In the present case the defendant was one of the payees of the note, and the note was also payable to bearer. He transferred the note and guarantied the payment. In my opinion, any one who should become the holder of the note could maintain an action upon the guaranty, unless it should be shown that the contract of guaranty was not transferred at the time the note was transferred. (*See McLaren* v. *Watson*, 26 *Wend.* 425.)

The statute of limitations did not commence running in favor of the defendant until the cause of action accrued upon the contract of guaranty.

The contract of guaranty was not within the statute of frauds. The consideration, "for value received," was sufficiently expressed to satisfy the requirement of the statute. (*Douglass* v. *Howland*, 24 *Wend.* 35. *Watson's Ex'rs* v. *McLaren*, 19 *id.* 557.)

The judgment should be affirmed.

[Erie General Term, September 8, 1856. *Bowen, Mullett, Greene* and *Marvin*, Justices.]

PRENTISS *vs.* FARNHAM, late sheriff, &c.

The defendant, who was sheriff of Erie county, by public advertisement, on the 24th of December, 1852, offered a reward of $250 for the discovery and apprehension of the person or persons who murdered J. B. The plaintiff, a constable, on the 18th of January, 1853, arrested one F. without warrant, believing him to be the murderer, and took him to the jail of Erie county. F. was subsequently tried for the offense, and was convicted and executed. In November, 1853, the plaintiff, at the request of the defendant, made application to the board of supervisors of Erie county to raise the amount of the reward and to pay the same to him. One M. claimed a part of the reward, and he and the plaintiff appeared before the board and were heard upon their claims. The board allowed the plaintiff $150 and M. $100. An order for $150 was given to the plaintiff, who took it, and received the money from the treasurer, at the same time claiming, however, that he was entitled to the whole amount of the reward, and protesting that he did not receive the $150 in full of his claim. M. received the $100 awarded to him. In an action against the sheriff, to recover the amount of the reward; *it was held* that the plaintiff and M. having referred their respective claims to the board of supervisors, and consented that the board should settle their respective rights to the reward, and the board having settled those rights, and the plaintiff having received the amount to which by the decision he was entitled, he had no further claim against the defendant.

THIS action was brought to recover the amount of a reward offered by the defendant, sheriff of Erie county. The offer was published as an advertisement, thus: "Two hundred and fifty dollars reward is hereby offered for the discovery and apprehension of the person or persons who murdered John Brown, in the town of Alden, in this county, on the evening of the 21st instant. Dated Buffalo, Dec. 24, 1852.

LEROY FARNHAM, Sheriff."

The cause was tried at the circuit without a jury, and the facts were agreed upon. The material facts may be thus stated. Brown was murdered in November, in the town of Alden, by one Fogerty; the defendant published the advertisement as above; and the plaintiff was informed and believed that such advertisement was published. Upon a complaint duly made on oath, prior to January 1, 1853, a police justice of the city of Buffalo had issued his warrant for the arrest of Fogerty, upon the charge of the murder of Brown, and the warrant was de-

livered to a constable of the county of Erie. The plaintiff was a constable of the town of Amherst, and on January 18, 1853, he arrested Fogerty in the town of Amherst, in said county, without a warrant, and without hearing that any warrant had been issued, and took him to the jail of the county. The plaintiff, prior to the arrest, had been informed, and he believed, that Fogerty was guilty. Fogerty was tried, convicted and executed.

The plaintiff, in November, 1853, at the request of the defendant, made application to the board of supervisors of Erie county to raise $250 and to pay the same to him. He claimed that sum. One Albert Marshall claimed part of the sum, and the plaintiff and Marshall appeared before the board and were heard upon their claims. The committee on sheriff's accounts, to whom the petition of the plaintiff was referred, made a report, coming to the conclusion that the plaintiff was entitled to the whole reward offered; and they recommended that an order be drawn, in favor of the plaintiff, upon the county treasurer for that amount. This report was amended by the board, and Marshall was allowed $100, and the plaintiff $150. An order for the $150 was given to the plaintiff, who took it, and received from the treasurer the money; he, at the time of taking the order, claiming that he was entitled to the whole sum of $250, and protesting that he did not receive it in full of his claim. Marshall received the $100 awarded to him. Before the commencement of this action, the plaintiff demanded of the defendant the two hundred and fifty dollars, and the defendant refused to pay it. The court, as a conclusion of law, decided that the plaintiff was not entitled to judgment, and judgment was directed to be given for the defendant. The plaintiff excepted, and judgment being perfected, he appealed to the general term.

B. H. Austin, for the plaintiff

A. Sawin, for the defendant.

By the Court, MARVIN, J. The defendant insisted that the proceedings by and before the board of supervisors, and the

payment to the plaintiff of the $150, constitute a bar to this action. In his answer, after stating that Marshall and the plaintiff each claimed the reward, and that he referred them to the board of supervisors, he states that they submitted to the arbitrament and decision of the board of supervisors their respective claims, &c. He also alleges, in his answer, that he paid the plaintiff $150 in full satisfaction of his claim. His counsel also insisted, upon the argument, that as the plaintiff was a constable, he could not claim the reward. If the defendant is right in his previous positions, it will not be necessary to examine the last.

The defendant was sheriff of Erie county. He offered the reward. There is no question but that he assumed a personal liability. Nevertheless, he relied upon the county for indemnity, and that the board of supervisors would admit and allow in his accounts any sum that should be properly paid out by him in securing the detection and arrest of the criminal. He referred the plaintiff to the board of supervisors, and the plaintiff presented his petition to the board. Marshall made a claim for a part of the sum. And these claimants appeared before the board and were heard, and they submitted to the board their respective claims. Their claims rested upon the reward offered by the defendant. The board of supervisors acted upon these claims as founded upon the reward offered by the defendant, the sheriff of the county. One of the claimants claimed the entire amount of the reward offered, and the other claimed a part of it, upon what grounds does not appear. The supervisors allowed the whole $250. Should the defendant now pay to the plaintiff the $250, or the $100, he would have no claim, equitable or otherwise, upon the county. It seems to me that the plaintiff, when he consented to refer his claim to the board of supervisors, and appeared and prosecuted his claim, and resisted the claim of Marshall to any portion of the reward, thereby consented and agreed to abide by and stand to the decision which the board should make as to the rights of the claimants to the money. He might have refused to submit the question to the board of supervisors, and have resorted to his remedies

against the defendant. But having consented to go before the board and submit his claim in competition with the claim of Marshall, and having received that portion of the reward awarded to him, it seems to me that his claim against the defendant, the sheriff of the county, is satisfied, and that he can maintain no action for the whole reward, or for that part not allowed to him by the board. His claiming that he was entitled to the whole sum, at the time he received the $150, and protesting that he did not receive it in full of his claim, will not affect the question. He is bound by the submission of the questions to the board of supervisors and their award and the receipt of the money awarded. If he had not received the money from the county, perhaps he could have maintained an action against the defendant, but he could only have recovered the $150 as awarded by the board of supervisors. The claimants consented that the board should settle their respective rights to the reward, and the board having by their decision settled them, and the plaintiff having received the amount to which, by the decision, he was entitled, he has no further claim against the defendant.

It will not be necessary to examine the question whether the plaintiff, being a constable, could claim the reward. The judgment should be affirmed.

[Erie General Term, September 8, 1856. *Bowen*, *Mullett*, *Greene* and *Marvin*, Justices.]

22 522
28 479

Denvrey *vs.* Fox.

A levy upon sufficient personal property is not *per se* a satisfaction of the judgment.

An execution issued upon a justice's judgment directs the constable to levy, of the goods and chattels of the defendant, the amount of the judgment. There is no restriction upon the officer as to the amount of property he shall take; nor is he required to levy upon all the property at the same time.

He may, therefore, after having levied upon sufficient property to satisfy the execution, levy upon other property, at a different time, and sell it, without making himself liable as a trespasser.

Denvrey *v.* Fox.

APPEAL from a judgment of the Cattaraugus county court reversing the judgment of a justice. The facts are sufficiently stated in the opinion.

S. S. Spring, for the plaintiff.

Nelson Cobb, for the defendant.

By the Court, MARVIN, J. The plaintiff complains that the defendant converted to his own use three cows, the property of the plaintiff; and the object of the action was to recover the value of the cows. The defense was that the defendant was a constable, and took and sold the cows, or two of them, by virtue of an execution issued upon a judgment against the present plaintiff. Upon the trial, evidence was given of the taking of the cows and the sale by the defendant of two of them. The defendant gave in evidence a judgment in favor of one Knight against the present plaintiff, rendered in a justice's court, and an execution issued thereon to the present defendant as constable, and proved that the cows were levied upon and sold to satisfy that execution. The present plaintiff then gave evidence tending to show that, about a week before the taking of the cows by the defendant, the plaintiff turned out to the defendant, and the defendant levied upon, other property of the plaintiff sufficient to satisfy the execution, viz. a colt, a fanning mill and a lined back cow. The defendant denied that he had made any levy upon the colt, &c., and there was considerable evidence touching this question; enough, I think, to make it a question of fact for the jury. The plaintiff insists that the defendant was a trespasser in taking and selling the cows, after he had levied upon sufficient personal property to satisfy the execution. The levy upon the cows, and the sale, were within the life of the execution, and the defendant insists that he had the legal right to levy upon the cows and sell them, and that he cannot be made liable in this action for the conversion of the cows. That if liable at all, it would be for an excessive levy. In my opinion, the positions of the defendant are sound. The constable

was commanded by the excution "to levy, of the goods and chattels of the defendant, (except, &c.) the amount of the said judgment," &c. The execution was in accordance with the law. Here then was a general authority to take the goods and chattels of the plaintiff; and had the constable taken all the goods and chattels of the debtor, at one time, it is not claimed that he would have been a trespasser. But it is claimed that having once made a levy sufficient to satisfy the execution, no power to make a further levy existed, though the goods first levied upon remained in the custody of the debtor, and were never removed or sold. The plaintiff's counsel has referred to authorities, in which it has been said by the court that a levy upon sufficient personal property to satisfy the execution is a satisfaction of the judgment. An examination of all the cases will show that this, as an unqualified position, cannot be sustained. In *Hoyt* v. *Hudson*, (12 *John.* 207,) the constable had levied upon the property of the plaintiff, and had taken the receipt of a third person to deliver the property to him. The property was not redelivered to the constable, and he levied upon and took other property of the debtor, who sued the constable for the last taking of property. It was held that the plaintiff could recover. In the decision the court say: "When an officer, under an execution, has once levied upon the property of the defendant, sufficient to satisfy the execution, he cannot make a second levy." We shall presently see that this position, without qualification, is not correct. It was not necessary to the decision of the case. The constable had taken the plaintiff's property and had delivered it to a receiptor. The debtor had been deprived of his property, and the constable had his remedy against the receiptor.

In *Ex parte Lawrence*, (4 *Cowen*, 417,) the creditor had levied upon sufficient personal property of his debtor to satisfy his execution, and had taken a receipt for it. He delayed the sale from time to time, and then claimed the right to redeem, as a judgment creditor, the land of the debtor sold by virtue of another judgment and execution. The court held that he had no right to redeem, and remarked that his judgment ceased to be a lien

from the time of the levy, and that the levy upon sufficient personal property operated *per se* as an extinguishment. In *Jackson* v. *Bowen*, (7 *Cowen*, 13,) sufficient personal property had been levied upon and the execution had been returned by the directions of the creditor, and another execution had been issued and the debtor's land had been sold. The court refer to *Ex parte Lawrence*, and say that the levy upon sufficient personal property was an extinguishment of the judgment, and the judgment ceased to be a lien. It is the right of the judgment debtor to have his personal property sold, before resort is had to a sale of his real estate. There was sufficient personal property levied upon, and the creditor had no right, without a sale, to abandon the property and resort to a sale of the real estate.

In *Wood* v. *Torrey*, (6 *Wend.* 562,) sufficient personal property had been taken, and the creditor receipted the property to the plaintiff, promising to deliver the property when called for, or when he should want it sold on the execution. Some three or four years after this the creditor directed the sheriff to advertise and sell the land of the debtor, which the debtor had sold to a purchaser, who purchased in good faith. At the instance of the purchaser of the real estate, a perpetual stay of execution was ordered. In *Mickles* v. *Haskin*, (11 *Wend.* 125,) it was held that a levy on property sufficient was not a satisfaction of the judgment, when the property had been fraudulently withdrawn by the defendant from the officer. In that case a sufficient levy had been made by the constable, and the defendant had removed the property, and the action was upon the judgment, and a recovery was had; thus showing that a levy upon sufficient personal property is not *per se* a satisfaction of the judgment.

In *Green* v. *Burke*, (23 *Wend.* 490,) a levy was made upon sufficient personal property, which was left with the defendant. The constable, being under age, abandoned the levy and returned the execution to the justice, who issued another execution to a different constable, and the latter levied upon and sold other property of the debtor. Justice Cowen reviewed, at much

length, the previous cases, and held in the case under consideration, that the judgment was not satisfied by the first levy. That a levy is only a satisfaction *sub modo*, and not absolute *per se*.

In *The People* v. *Hopson*, (1 *Denio*, 574,) it was held that an execution from a justice's court may be renewed after a levy has been made sufficient to satisfy it, when there was not time enough remaining to advertise and sell. That a levy upon sufficient personal property suspends other remedies of the creditor while it continues, but that when nothing more is done, it never amounts to a satisfaction of the judgment. Bronson, Ch. J. says, "The true rule I take to be this: the judgment is satisfied when the execution has been so used as to change the title, or in some other way deprive the debtor of his property." In *The People* v. *Hopson* the constable levied upon additional property after the renewal of the execution. No point is made in relation to this fact.

As we have seen, the direction in the execution is to levy, of the goods and chattels of the defendant, the amount of the judgment. There is no restriction upon the officer as to the amount of property he shall take, nor is he required to levy upon the property at the same time. It would be extremely dangerous to hold that when the officer had once levied upon sufficient property to satisfy the execution, his power to levy upon more was gone. How is he to know when he has made a sufficient levy? This cannot usually be ascertained with certainty until the sale. The defendant was not a trespasser in taking and selling the cows, and the judgment was properly reversed.

Judgment of the county court affirmed.

[Erie General Term, September 8, 1856. *Bowen, Mullett, Greene* and *Marvin*, Justices.]

22 527
57 82
20a 52
77a 607

CHASE *vs.* THE HAMILTON MUTUAL INSURANCE COMPANY OF SALEM, Mass.

A fire insurance company located in another state, by a written instrument constituted and appointed A. its agent at Lockport, for the term of two years, "with authority to act in the capacity of an insurance broker, for the purpose of receiving applications for insurance and transmitting them to the home office, and otherwise aiding in the negotiation of fire insurance and in the transaction of business pertaining thereto." *Held*, that the agent had no authority to bind the company to issue a policy.

An application was made by the plaintiff to A., the agent of an insurance company, for insurance, which, on being forwarded to the company by A. was rejected, on the ground that the risk must go into another company (the Manufacturer's) at 2½ per cent. And A. was requested by the company, if the plaintiff desired it, to return the application upon one of the Manufacturer's blanks. A., after communicating with the plaintiff, sent forward another similar application, and requested that a policy should be sent, at as low a rate as possible, and suggested that perhaps the plaintiff would pay 2 per cent. The agent sent, at the same time, an application from another person, for insurance to the amount of $200. The president of the insurance company replied, "I shall fix the rate of the two risks to day received, one of $1500 and one of $200, at two per cent, $34." This proposition was communicated, by A., to the plaintiff, who at once accepted it, and paid to A. the amount necessary, in addition to what had been previously sent, to make up the sum of $30, and took a receipt from A. for the amount, which stated it to be the balance of $30 premium for an insurance of $1500 on his dwelling insured in the H. Ins. Co.

Held, that the contract was fully completed between the parties when the plaintiff accepted the company's terms and paid the premium to A.; and that the company was bound to issue a policy to the plaintiff, and was liable for a loss which had occurred, to an amount not exceeding $1500.

Held also, that no time being fixed by the company within which the proposition was to be accepted and the money sent, the law would fix a reasonable time. And that accepting the proposition and paying the premium by the plaintiff to the agent, the next day after being notified of the offer, was within a reasonable time.

Held further, that if the money was paid to the agent before the loss occurred, it was sufficient, although it was not forwarded to the company, by the agent, until after that event happened.

In the letter of the president of the insurance company to A., fixing the rate of premium to be charged, he called the attention of A. to his accounts, and asked him to make some arrangement to meet the amount due for premiums, before they should write any more policies for him, "or that the money should accompany the new policies." He added, "The amount due on these would be $30.60. If that be sent, we will forward policies." The latter part of this letter was not communicated to the plaintiff, by A. *Held*, that this was not a *condition* annexed to the liability of the company, requiring that the money

should be actually in the company's hands before the contract should be binding.

The by-laws of an insurance company provided that any policy issued by it should be void unless the true title and interest of the assured was expressed in the proposal or application for insurance, and unless all incumbrances, and the amount and nature thereof, were therein disclosed. The plaintiff, having previously entered upon land by virtue of a contract for the purchase thereof, and having erected a dwelling house thereon, and paid all the purchase money, so as to entitle him to a deed of the premises, applied for insurance upon the house, describing it as his stone dwelling house, and as belonging to him; *Held*, that this was not a false warranty or representation of the plaintiff's title to the property insured, within the meaning of the by-law, or in any sense, the plaintiff being in fact the owner of the property, and entitled to the legal title.

Where an application for insurance described the property merely as a stone dwelling house, and it appeared from the notice of loss that it was in fact a three story dwelling house, 28 by 34 feet, *with a one story wood kitchen part attached thereto*, 12 *by* 14 *feet*, but there was nothing to show whether the kitchen part was a mere temporary structure, or how it was constructed and attached; *Held*, that upon the evidence, the court could not say that the referee was bound to find a false representation or description of the property insured.

Where the by-laws of an insurance company declare that unless the applicant for insurance shall make a true representation of the property on which he requests insurance, "*so far as concerns the risk and value thereof*, the policy issued thereon shall be void," it is only those representations which concern the *risk* and value of the property that are material. Hence, the question arising upon all omissions to make true representations of the property become questions of fact, whether the risk was increased, or the value overstated.

APPEAL from a judgment rendered upon the report and decision of a referee. The action was upon a contract to insure against loss by fire. The referee stated in his report the facts found by him. The case also contained a statement of the evidence and exceptions. The facts appearing and the questions raised, are sufficiently stated in the opinion of the court.

S. Caverno, for the plaintiff.

Olin & Geer, for the defendant.

By the Court, MARVIN, J. The defendant is a mutual insurance company, under the laws of Massachusetts, having its

office in that state. The plaintiff resided at Lockport, in this state, and the transactions, resulting as he claims in a contract to insure, were had between him and one Israel G. Atwood, of Lockport, and between Atwood and the defendant. In February, 1854, the defendant, in writing, constituted and appointed Atwood its agent for the term of two years, "with authority to act in the capacity of an insurance broker, for the purpose of receiving applications for insurance, and transmitting them to the home office, and otherwise aiding in the negotiation of fire insurance and in the transaction of business pertaining thereto." It was declared that the commission should not be held or construed to confer a general agency, but only such limited and special power as should be necessary for the transaction of brokerage business; that the agent should not possess the power to bind the company by his own acts or representations, in any case, or to do any thing unauthorized by the by-laws of said company, or for which instructions and directions had not been communicated to him by the officers of the company. In September, 1854, the plaintiff made a written application and delivered it to Atwood, for insurance against loss or damage by fire, for the term of three years, in the sum of $1500, "on his stone dwelling house" in Lockport. In this application the question, "Whose is the property to be insured and where situated?" was answered, "applicant's." The property was surveyed by Atwood, and the printed application was filled out by him. The defendant, at the time it appointed Atwood an agent, in writing, delivered to him printed blanks, signed by the president and secretary, for short or temporary insurance of the applicant's property, pending the negotiation for a policy, and which was limited to ten days. The plaintiff, upon delivering the application to Atwood, paid him for premium $11.25, and Atwood filled up a blank for an insurance for ten days and delivered it to the plaintiff. Atwood then forwarded to the defendant the application for insurance, and the premium for a policy. The defendant declined taking the risk, and returned the application, but retained the premium sent, and credited it to Atwood's

account, Atwood being indebted to it on account of previous transactions. The president of the defendant wrote Atwood that he returned the risk; that it must go into the Manufacturer's company at 2¼ per cent per annum. That if the plaintiff desired a policy at that rate Atwood was desired to return the application, on one of the company's Manufacturer's blanks. He stated that he gave Atwood credit on account for the money received. Atwood informed the plaintiff of the return and rejection of his application and the reasons therefor, and told him he thought there was a mistake about it; that he would make out another application. The plaintiff then signed a blank application dated October 18, and Atwood filled it up from the previous application, and October 23 forwarded this application to the defendant, writing an explanatory letter. He at the same time changed the dates, in the short policy of insurance, so as to insure the plaintiff for ten days, commencing October 23, at 12 M. In his letter to the defendant, Atwood stated that he did not know what per cent the plaintiff would pay; may be 2 per cent, not more; that he had told the plaintiff that he would send the application, and that the company would take it as low as safety would warrant. On the application he wrote a note principally explanatory, and concluding, "send a policy at as low a rate as you can." The president replied, October 26, 1854, saying that he fixed the rates of the two risks (another application for another person had been sent by Atwood at the same time) that day received, one of $1500 and one of $200, at 2 per cent, $34. He then called Atwood's attention to the state of his accounts, and says, "We are compelled to ask you to make arrangements to remit the amount due from you for premiums, before we write more policies for you, or that the money shall accompany the new policies. The amount due on these would be $30.60. If that be sent, we will forward policies." (It should have been previously stated that Atwood, in the fall of 1853, prior to his written commission or appointment as agent, had, in pursuance of a previous conversation with the president, received applications for insurance and premiums, and had forwarded the applications for approval. That the defend

ant had opened an account with him, charging him the premiums on the policies and crediting the moneys he forwarded This account was in arrear.)

Atwood received the letter of the president, of the 26th October, on the 31st, and showed to the plaintiff that part of it, fixing the premium at 2 per cent. November 1, the plaintiff paid to Atwood $18.75, making with the $11.25 previously paid, the sum of $30 for the premium, at two per cent, on the $1500; and Atwood gave him a receipt stating that he had received $18.75, the balance of $30 premiums for an insurance of $1500 on his Niagara street dwelling, insured in Hamilton Insurance Co. This was signed by Atwood, agent. The house was destroyed by fire on the night of November 2, without the fault of the plaintiff. November 4, Atwood forwarded to the defendant, by mail, $30.54, "to pay premium on Messrs. Wilcox & Chase, (plaintiffs,) insurance as per letter of acceptance this day received." This letter bore date November 1, 1854. The president replied November 6, 1854, "Your letter bearing date November 1, 1854, but mailed subsequently, came to hand to day. I hasten to reply that the directors decline writing a policy on either of the risks named, Wm. W. Wilcox and Samuel L. Chase. You will also suspend all business for this company until your accounts are settled," &c. "The amount, $30.54, received from you, I will, with your consent, place to your credit on account. Please write me whether to do so or not." Previous to writing this letter the president had learned, from the papers, of the fire in Lockport, but had not learned that the plaintiff's house had been destroyed.

The referee found, as the law of the case, that the defendant did, on the first day of November, 1854, agree with the plaintiff to insure him against loss and damage by fire to his dwelling house, and that the plaintiff was entitled to have from the defendant its usual policy of insurance in such cases, &c., and gave judgment for the plaintiff.

Probably the most important question in this case is, was there a contract between the parties at the time of the loss, binding the defendant to indemnify the plaintiff to the extent of

$1500 for such loss, or to issue a policy to the plaintiff which would so bind it. The short, or ten days' policy, had expired a few hours before the loss, and that may therefore be excluded from consideration, except as it may be important in the history of the negotiations, in ascertaining in what such negotiations resulted. It is also clear, I think, that the written commission of Atwood, or his powers as agent, did not authorize him to bind the company to issue a policy. We are then to consider the facts, and ascertain whether there was an agreement between the plaintiff and defendant, by which the defendant was bound to issue the policy. After a careful consideration of the facts found by the referee, supported as they are by the evidence, I have come to the conclusion that they sustain the decision of the referee. That he was authorized to find, from the evidence, a contract binding the defendant to issue a policy to the plaintiff. It will not be necessary here to recapitulate the facts, but I shall refer again to the facts upon which I think the referee was justified in deciding that a contract was actually made. When the first application was received by the defendant it was rejected, and the reason assigned, viz. that the risk must go into the Manufacturer's company, at 2¼ per cent, and Atwood is requested, if the plaintiff desires, to return the application upon one of the Manufacturer's blanks. Atwood thinking there was some misapprehension, and after communicating with the plaintiff, sent forward another similar application and wrote explanatory, and requested that a policy should be sent at as low a rate as the defendant could. He stated that he did not know what per cent the plaintiff would pay, but suggested that he might pay two per cent. He informed the defendant that he had told the plaintiff the defendant would take the risk as low as safety would warrant. The president replied, "I shall fix the rate of the two (Atwood had sent another application) risks to day received, one of $1500 and one of $200 at two per cent, $34." This is clear and definite. It was a proposition, after considerable negotiation, upon the only question about which the parties had differed. This proposition was communicated to the plaintiff, and he at once accepted it and

paid to Atwood all the money required, to wit, $18.75, making $30 with the amount previously paid. No question is made as to Atwood's authority to receive the money. In my opinion, the contract was fully completed between the parties when the plaintiff accepted the defendant's terms and paid the premium to Atwood, unless the proposal of the defendant was conditional, and the condition was not performed. It is claimed that the proposition was coupled with a condition that was not performed. In the letter of the president, of the 26th October, Atwood's attention is called to his accounts, and the president asks him to make some arrangement to meet the amount due for premiums before they should write any more policies for him, "or that the money should accompany the new policies." He adds, "The amount due on these would be $30.60. If that be sent, we will forward policies." No part of this letter came to the knowledge of the plaintiff, except the first sentence relating to the rate of insurance. The plaintiff regarded Atwood as the agent of the defendant, for the purpose, at any rate, of receiving and communicating the propositions of the defendant, and receiving and transmitting the premiums. But it is not perhaps very material how this may be viewed. If we regard the letter as fixing the rate at two per cent, and a promise to forward the policy if that sum was sent, there was a compliance with the condition. The plaintiff paid the balance of the money to Atwood October 31, and Atwood, November 4, in a letter dated November 1, mailed the money, $30.54, to the defendant. This was designed to include the premium on the $200 Wilcox risk. The president in his letter says, the amount will be $30.60, and from his answer to Atwood, November 6, he acknowledged that he had received $30.54. Here is a discrepancy of six cents: no point is made of this. The refusal to issue or write a policy, is not put upon this ground. The ground taken by counsel is, that by the letter of October 26, the defendant refused or protested that it would not be bound after the expiration of the short policy, till the premium was in its hands; that as the short policy had expired when the fire happened, and as the premium had not then been received, the plaintiff had no

contract to stand upon. I do not so understand the matter. The learned counsel excepts from this position the words, "insured in the Hamilton Insurance Co.," as used by Atwood, in the receipt given by him to the defendant for the balance of the $30, dated October 31, before the short policy expired, and argues that Atwood had no authority to make a contract of insurance binding upon the company. I lay no stress upon this language in the receipt, or the receipt itself, except as evidence that the plaintiff paid the money. But let us return to the letter of the 26th October. I repeat, that I do not understand that it contains any refusal or protest not to be bound until the premium was actually received by the company. The parties were negotiating for a policy. It does not now appear that the defendants knew that the short policy had been issued; that it was in existence, and would expire at noon on the 2d day of November. The defendants make a proposition, and say if the money is sent, we will forward policies. They fix no time within which the money shall be sent. They make no reference to the short policy. The plaintiff intended to keep himself insured, accepted the offer, and paid the premium two days before the short policy expired and immediately upon being informed of the proposal. He knew nothing of the condition, as it is called, in the letter of the president, and I very much doubt whether he could be affected by the omission of Atwood to send the money. But as no time was fixed within which the proposition was to be accepted and the money sent, the law fixes a reasonable time, and I think that the referee was justified in finding that the money was sent in a reasonable time. It is true, the money was not sent until after the fire. It was paid before the fire. I concede, had the fire occurred before the proposition was accepted by the plaintiff, he could not have accepted it and paid over the money. There was undoubtedly an implied condition in the proposal, that the property should be in being at the time the offer should be accepted. He however accepted before his short policy expired, and did all that he was bound to do.

The defendants say, if the money is sent, we will forward the policies. The money was sent in a reasonable time, and the de-

fendants received it. Suppose there had been no short policy, and the fire had occurred the next night after the proposal of the defendant was accepted and the money paid to Atwood, and before Atwood had mailed it, would not the defendants have been bound, upon receiving the money, to write a policy? In *Perkins* v. *Washington Ins. Co.* (4 *Cowen*, 645,) the premium was to be received, at the office in New York, before the company was bound to issue a policy. The agent in Savannah, Ga. received the premium and gave a receipt. Six days afterwards the goods were destroyed by fire. The agent had not transmitted the money. After the loss the money was tendered at the office in New York, and the company refused to receive it or issue a policy. A bill was filed in chancery, and the court for the correction of errors held that the company was liable.

Without remarking upon the fact that the defendant retained the money of the plaintiff, in my opinion the defendant was bound to issue a policy to the plaintiff, and it is liable for the loss, not exceeding the $1500.

The contract was for a policy for three years, as the application was to be insured for that time. The policy was to be in the form and upon the conditions used by the defendant. If the plaintiff has done any thing, or omitted to do any thing, which, had the policy been issued, would have enabled the defendant to avoid it, I have no doubt such defense may be interposed to this action. We must assume that the plaintiff understood the terms and conditions of the policy, for which he negotiated and bargained.

It is objected that the plaintiff cannot recover, because he made a false warranty of his title in the property to be insured. The plaintiff was, and had been, in possession of the insured premises for several years. He entered under a contract to purchase the land, and erected the house. He did not make the payments strictly according to the agreement for the purchase. The agreement was made in May, 1850, and the consideration money, $200, was to be paid in one and two years, with interest. The contract contained a provision that in case the vendee should make default in performing according to his

covenants, then, after the default, the contract should be void and of no effect. The vendor, in December, 1851, extended the time of payment to July, 1852. He died in December, 1852. An administrator was appointed, and in December, 1852, the plaintiff paid a part of the consideration to the administrator, and by the 1st of September, 1853, he had paid all the consideration. At the time the application for insurance was made, the plaintiff had paid all the purchase money, and was entitled to a conveyance in fee. He had, soon after the contract of purchase, erected the dwelling house. In the application for insurance he represented the property to be insured as "his stone dwelling house." To the question, "Whose is the property to be insured?" he answered, the "applicant's." The by-laws of the defendant provided that "any policy issued by this company shall be void, unless the true title and interest of the assured be expressed in the proposal or application for insurance, and unless all incumbrances and the amount and nature thereof be therein disclosed."

Under these circumstances, it is insisted that the representation as to the title to the property was false. In my opinion this objection is not well taken. The plaintiff was the owner of the house and the premises. True, he had not the legal title, but he was entitled to it. He was not a purchaser in possession, bound to pay the purchase money before he could demand a conveyance. He had paid the entire consideration for the purchase and was in possession, and could maintain that possession, even against those in whom the technical legal title was vested. Especially is this so since our code authorizing a defendant to avail himself of any defense, legal or equitable, or both, (*Code*, § 150,) and the court to grant the defendant affirmative relief to which he may be entitled. (§ 274.) Had the heirs of the vendor instituted an action of ejectment against the plaintiff, he could have stated in his answer the facts and maintained his possession, and have obtained a judgment that the legal title be conveyed to him. In my opinion the representation in the application touching the title was not a false warranty of title, within the meaning of the by-laws, nor in any

sense. The plaintiff was the owner of the dwelling house and land.

It is also insisted that the plaintiff made a false warranty touching the position and condition of the house. In answer to the printed interrogatories, the plaintiff substantially represented that the building was a stone building, roof of wood. As to the dimensions of the building, he answered 26 by 33 feet, two stories and an attic. He answered the question touching the distances and direction of adjacent buildings, &c. In answer to the last question, "Are there any other material circumstances?" he answers "*No.*" It is claimed that there was a wooden structure connected with the house, which was not described. The only evidence which I find in the case touching any such structure, is in the notice given by the plaintiff to the defendant of the loss, dated November 10, 1854. The property insured is mentioned as the stone dwelling house, to wit, said house was a three story stone dwelling house, 28 by 34 feet, *with a one story wood kitchen part attached thereto*, 12 *by* 14 *feet.* Nothing is said, in the application, about this "kitchen part." Atwood made the survey and filled up the application. The plaintiff was, however, responsible for the correctness of the representations. The referee has said nothing, in his finding of facts, upon this question; and whether there was any more evidence or any explanation, does not appear, as we have a bill of exceptions. The referee must have found that there was no material misrepresentation. Whether this "one story wood kitchen part *attached*" to the stone dwelling was a mere temporary structure, or how it was constructed and *attached*, does not appear. The application was for insurance upon the "stone dwelling house." That was sufficiently and truly described, unless the "kitchen part attached" is to be regarded as a part of the house. There is no complaint that the description was not true as far as it went; but if the "kitchen part attached" was part and parcel of the house, then the description was not full and complete.

In *Fowler* v. *Ætna Ins. Co.* (6 *Cowen*, 673,) the description was false. The description was a framed house *filled in with*

brick. In truth the walls were hollow—not filled in with brick; thus the description was affirmatively false. I am inclined to the opinion that we cannot say, as the case appears before us, that the referee was bound to find a false representation or description of the "stone dwelling house."

As a part of the information desired, the applicant was required to "describe the distances and directions of adjacent buildings and their materials and occupation. Construct on the third page a ground plan of the premises and other property within one hundred feet, giving the distances, direction and occupancy." An answer was given to this, mentioning several buildings. No objection is made to this answer, unless it is that it failed to say any thing of the "kitchen part attached." If this should have been mentioned in this answer, it will not follow that the omission to mention it avoided the policy. By the by-laws the application is a warranty, and it is made a part of the policy and contract of insurance. (*Art.* 6.) We are to keep in mind that there was nothing said in the application as to this "kitchen part attached." The application is entirely silent; and the question therefore is, whether the failure to notice it was such a suppression of a required fact as to render the policy void. In the 13th article of the by-laws it is declared, "Unless the applicant for insurance shall make a true representation of the property on which he requests insurance, *so far as concerns the risk and value thereof*, the policy issued thereon shall be void." These by-laws constituted a part of the contract. The provision here referred to is important. Unless the applicant makes a true representation of the property, *so far as concerns the risk and value thereof*, the policy shall be void. Here the effect of the absence of a true representation is declared, viz. that it shall avoid the policy; but what representations? not all. It is only those which concern the *risk* and value of the the property. This being so, the questions arising upon all omissions to make true representations of the property become questions of fact, whether the risk was increased or the value overstated. In the case before us, the question was whether the omission to state the existence of the "kitchen part attached'

affected the risk; or, in other words, whether the risk was increased by this "kitchen part attached." This was a question for the referee, and he has found upon it against the defendant. It will be seen that *Burritt* v. *Saratoga Ins. Co.* (5 *Hill*, 188,) and the cases following that case, are not in point in this case. Any misrepresentation or concealment in the application, made the policy void and of no effect. Here the representations *made* were a warranty. None was made, as to the kitchen part attached, and the absence of a true representation of the property, so far as concerned *the risk*, avoided the policy. The defendant answered the last question, "Are there any other material circumstances?" in the negative. This was his opinion, and it seems to have been the opinion of the referee. If it be held to be a warranty, the referee has found that it was not broken. (*See Gates* v. *Mad. Co. Mut. Ins. Co.* 2 *Comst.* 49; *S. C.* 1 *Selden*, 469.)

Some exceptions were taken during the progress of the trial. I have examined them, but shall only remark that, in my opinion, they were not well taken. Upon the whole case, I think the judgment should be affirmed.

[Erie General Term, September 8, 1856. *Bowen*, *Mullett*, *Greene* and *Marvin*, Justices.]

Parmalee *vs.* Wilks and others.

The plaintiff, being the owner of a raft of saw logs, lying at Port Maitland, Canada, made a contract with the defendants, who were the owners of a steamboat, by which it was agreed that the defendants would come to Port Maitland on the next Tuesday morning, with the steamboat, and would proceed up the river about five miles to D. and there land her passengers, and immediately return to Port Maitland and take the plaintiff's raft in tow and tow it to Black Rock, a distance of about 40 miles, which the steamboat could traverse in about fourteen hours, with the raft in tow. The usual time for the arrival of the steamboat at Port Maitland, upon her trips up, was 3 o'clock in the morning, and it generally took about two hours to proceed to D., land her passengers

and return to Port Maitland. On Tuesday morning the weather was fair and the lake and river were calm, and so continued through the day. But the boat failed to call for the raft, according to the agreement. In the evening, at about sunset, she returned, and took the raft in tow, for Black Rock. During the night a storm arose, and the raft went to pieces and was scattered along the shore. *Held* that, had the defendants entered upon the performance of their contract at the time specified, and used proper diligence in attempting to perform it, the plaintiff would have taken all the risk of storms or other casualties. But that, as the defendants delayed for some 14 hours to enter upon the performance of the contract, and as such delay resulted in the raft being overtaken by the storm, the defendants were responsible for the consequences. That when they took the raft in tow in the *evening* instead of the *morning*, as agreed, they took the risk of any storm that should arise after a sufficient time had elapsed for towing the raft to Black Rock if they had commenced the towing in the morning.

Held also, that the plaintiff had the right to fix the time in the contract; and to make it an essential part of the contract. That considering the dangers of navigation upon the lake, and the peculiar nature and condition of the plaintiff's property, he might determine when the voyage should commence, and make a special agreement to that effect. And, that upon the non-performance of the agreement, at the time specified, the party in default was liable for the damages resulting from causes which would not have arisen, had the agreement been performed.

A few days after the raft was thus broken up by the storm, the defendants agreed that if the plaintiff would collect the logs together, into rafts fit for towing, the defendants would take the logs in tow and tow them to Black Rock; *Held* that the expenses necessarily incurred by the plaintiff in collecting the logs and forming them into rafts, might be taken into the account, in estimating the damages arising from the breach of the contracts.

If property is exposed to imminent danger, it is not a violation of the statute prohibiting labor on the sabbath, to preserve it on Sunday, and remove it to a place of safety.

APPEAL from a judgment entered upon the verdict of a jury. The questions were raised by exceptions taken by the defendants. The trial was had at the Erie county circuit, in September, 1854. The facts and exceptions sufficiently appear in the opinion.

Geo. B. Hibbard, for the plaintiff.

D. Tillinghast, for the defendants.

By the Court, MARVIN, J. In June, 1851, the plaintiff owned a raft of saw logs which was at Port Maitland, upon the Canada side of Lake Erie, at the distance of forty-two miles from Black Rock, in New York. He made a contract on Saturday with the defendants, who were the owners of the steamboat Experiment, by which it was agreed that the defendants would come to Port Maitland, on the next Tuesday morning, with the steamboat Experiment, and would proceed up the river about five miles to Dunville Dam, and there land her passengers and immediately return to Port Maitland, and take the plaintiff's raft in tow and tow it to Black Rock. The plaintiff was to pay and did pay $100 for the services to be performed. The contract was made at Port Maitland, and the plaintiff at the time notified the defendants that, relying upon their performance of the contract, he should leave Port Maitland on Monday evening and go to Black Rock. It was shown by the evidence that the usual time for the arrival of the steamboat at Port Maitland, upon her trips up, was 3 o'clock in the morning, and that it would take about two hours to proceed to Dunville Dam, land her passengers and return to Port Maitland. On Tuesday morning the weather was calm, and the lake and river were calm; there was little wind, and no indication of wind, and the weather so continued through the day. The plaintiff left one Leach, who was in his employ, to get the raft together and to come down with it, and he and another man in the employ of the plaintiff were on the raft during Tuesday, at work for the plaintiff. The Experiment, that morning, passed up by the raft just at break of day. Leach remained upon the raft all day and saw nothing more of the boat till evening, when she returned and took the raft in tow about sunset and started with it in the regular channel for Black Rock. About 11 o'clock the wind arose, and increased until 1 o'clock, when it was blowing very hard. The water was very rough, and there was a heavy sea running, and the raft went to pieces from the force of the storm. It was scattered along the shore of a place called Long Beach, ten miles below Port Maitland, and was so scattered along the shore for twenty miles. It was shown that

the steamer would tow the raft at a speed of from two to three miles an hour.

Subsequent proceedings were taken by the parties, touching the logs, which will be hereafter stated. Let us at this point ascertain the rights of the parties under the contract, and the facts disclosed. That there was a breach of the contract made by the parties, cannot be successfully denied. That breach was in not taking the raft in tow on the *morning* of Tuesday, instead of the evening; and the important question is, what damages is the plaintiff entitled to for this breach of the contract. On the part of the defendants it is insisted that the plaintiff is only entitled to nominal damages; that time was not of the essence of the contract. It may be conceded that the precise time when a thing is to be done is not generally essential, provided the thing to be done be performed, and that in such case the measure of damages is the loss or injury sustained by the delay in performing the agreement. Thus, had the defendants in fact towed the raft safely through to Black Rock, and then delivered it some fourteen hours after it would have been delivered—had they entered upon the performance of their contract according to its terms—their liability for the breach of their contract, and the measure of damages, would have only been what the plaintiff had lost by their delay; and this would probably have been merely nominal, or a trifle more. There was, however, no performance of the agreement. To present the question simply, I may as well say here, that the defendants were not common carriers, and were not liable as such. They are liable simply for a breach of their contract, and the question is for how much damages are they liable. Had they entered upon the performance of their contract at the time specified, and used proper diligence in attempting to perform it, the plaintiff would have taken all the risk of storms or other casualties. But as the defendants delayed for some fourteen hours to enter upon the performance of the contract, and as such delay resulted in being overtaken by the storm, are not the defendants responsible for the consequences? In other words, did they not, when they took the raft in tow in the evening, instead of the morning, as agreed

take the risk of any storm that should arise after a sufficient time had elapsed for towing the raft to Black Rock, if they had commenced the towing in the morning? In my opinion they did; and the trial proceeded upon this principle. This cause had been previously tried and a new trial had been granted. Upon granting the new trial, Justice MULLETT remarked in his opinion: "It may be stated as a general proposition, which seems to commend itself to our sense of justice, that the person who sustains an injury by the default or misconduct of another in the performance of a legal duty, is entitled to recover of that other a compensation for all the injury he has sustained, as the immediate and direct result of such default or misconduct at the time. (*Sedg. on Dam.* 62, 63.) In the case under consideration, the defendants were bound by their contract to take the plaintiff's raft in tow at Port Maitland, where he had left it for that purpose in the morning, and to proceed with it with reasonable diligence to Black Rock, where the plaintiff had gone probably to receive it. The distance from Port Maitland to Black Rock, according to the proof, is not more than forty-two miles, and the time necessary for the boat to perform that trip, in suitable weather, with the raft in tow, was but about fourteen hours; the defendants did not take the raft in tow until sunset, and if the disaster which overtook the raft on the passage was the immediate and direct result of the defendants' delay in commencing the voyage, it appears to me that the defendants would be liable for the damage sustained by the plaintiff as the result of the violation of their contract."

It will be seen that the contract was very specific. The defendants were to come to Port Maitland the next Tuesday morning with the steamboat Experiment, and then proceed to Dunville Dam and there land her passengers, and then return immediately to Port Maitland and take the raft in tow and tow it to Black Rock. The parties knew the time in the morning when the boat usually arrived at Port Maitland, and the time it would require to go to Dunville Dam and return. Usually the boat would be at Port Maitland, on her return from the dam, about 5 o'clock, and this was about the time she would have been at

Port Maitland and taken the raft in tow upon the morning of Tuesday, had she simply proceeded to the Dunville Dam and then immediately returned. But she ran further up the river, and did not return until night.

We should keep in mind the contract, and the subject to which it related, and the condition in which the subject was. The subject was a quantity of saw logs, rafted together and lying in the river or harbor. This raft, when brought out of the river into the lake, could not be taken back into the river without the aid of other power. It could not be navigated and managed by men upon it. Once in the lake, it would be at the mercy of the winds and waves, and in a storm must go to pieces or be driven ashore. In short, it was necessary that it should be taken in tow by a boat capable of moving it in the proper direction, and then, in case of a storm before it was taken to a place of safety, it would probably be torn to pieces and scattered upon the surface of the lake until the logs should be driven ashore. Now all these facts and risks were well known to the parties making the contract. This is not all; those who have experience upon the lake are capable of forming opinions, more or less correct, as to the state of the weather upon the lake, for a day or two ahead; especially in the summer season. The owner of a raft of logs which lies securely in a river or harbor, and who wishes them moved upon the lake to some other place, may exercise his judgment and decide that he will have them towed at a certain time, and make his contract with those who tow rafts, to take it in tow at a certain hour, at which time he will have it out of the river, in the lake, so that the boat can take it in tow. If the boat appears at the time and takes the raft in tow, the risks of navigation and storms are with the owner of the raft, assuming that the boat owners perform their duty with proper diligence. But suppose the owner of the raft, relying upon his contract, drops his raft down from the river into the lake, and the boat should fail, entirely, to come and take the raft in tow, and the owner of the raft could procure no other boat, and a storm should arise and his property should be destroyed, he doing all in his power to protect and save it; will

it be pretended that the boat owners are not liable for all the damages the owner of the raft has sustained, which would have been avoided had the boat owners performed their agreement? It seems to me not. In the case under consideration the contract was specific; the raft was to be taken in tow *in the morning*. The plaintiff informed the defendants that he should leave Port Maitland Monday evening and go to Black Rock. He did so, leaving men in charge of the raft, to get it together and come down with it. These men were upon the raft working for the plaintiff, and they saw the boat pass up just as day was breaking. Had the boat taken the raft in tow at 5 or 6 o'clock in the morning, there can be no reasonable doubt that the voyage would have been performed in safety. From the evidence, it appears that the boat with the raft in tow, in good weather, could make from two to three miles an hour. This would have given 17 or 18 hours before the storm commenced. and 19 to 21 before the raft went to pieces. The court charged the jury that if they found that the raft would have been overtaken by the storm and injured, if the steamboat had taken the raft in tow and started in the morning, then the defendants were not liable for any injury that did happen, provided such injury would have happened, had the boat taken the raft at the time agreed upon; that if the defendants had taken the raft in tow at the time agreed upon, the plaintiff would have taken the risk of storms. In my opinion, the principle here presented was the true one, or, at any rate, quite as favorable to the defendants as they had a right to ask. It authorized the jury to consider the evidence, and to say whether the storm would have overtaken the raft, had it been taken in tow in the morning; and, if so, whether it would have been injured, and for such injury the defendants would not be liable. I am not clear that this rule was not too favorable to the defendants. Their counsel had requested the court to charge that if the jury found that the raft would have been overtaken by the storm and *injured*, if the boat had taken the raft in tow and started in the morning, then the defendants were not liable for the injury to the raft. The charge was not given in this form. Had it

been, and the jury had found that the storm would have overtaken the raft and *injured* it, though in a trifling degree, then they would have been instructed to give no damages, though by the injury which did happen the raft was lost.

The counsel for the plaintiff has likened this case to the case of a *deviation* from the voyage, and I am not prepared to say that the principles, as settled in those cases, are not applicable to this case. I have no doubt there was a deviation in the delay to enter upon the voyage of towing. The time for commencing the voyage was fixed with much precision. Suppose the plaintiff, on going to Black Rock, had effected an insurance upon the raft, specifying in the contract that the steamer Experiment was to take the raft in tow Tuesday morning and tow it to Black Rock. It will not be contended, under the facts of this case, that the insurers would have been liable. The delay of the steamer in taking the raft in tow, would discharge the insurers. The plaintiff's counsel has cited numerous authorities. I shall not cite them here. In my opinion the defendants, by their delay, took the risk of the storm which arose and scattered the raft. Had they performed their agreement, the injury would not have happened. The plaintiff had the right to fix the time in the contract, and to make it an essential part of it. Cases are numerous, where the precise time when a thing is to be done is of the utmost importance, and unless it be then done, great damage may result from the omission or delay. It may be said that these are cases where it can be seen that if the thing to be done is not done, damages will naturally result from the omission to do the thing, and that in this case it could not be foreseen that any injury would result from the delay of fourteen hours, and that therefore the parties could not have regarded the time as material. This position is not satisfactory to my mind. Considering the dangers of navigation upon the lake, and the peculiar nature and condition of the plaintiff's property, I think he had a right to determine when the voyage should commence, and make a special agreement to that effect; and in case such agreement should not be performed at the time specified, the party breaking the agree-

ment should be held liable for the damages which should result from causes which would not have arisen had the agreement been performed.

The plaintiff offered to prove that a few days after the raft was broken up the parties made another contract, by which it was agreed that if the plaintiff would collect the logs together, into a raft fit for towing, at Long Beach, the defendants would, at any time when the same was so fitted, upon the next day thereafter, which should be Sunday, Tuesday or Friday, take the logs in tow and tow them to Black Rock; that the plaintiff collected the logs and fitted them for towing, at six different times, and at an expense of $50 each time, and immediately gave notice to the defendants each time. That the defendants failed to take the logs in tow at any of the times, as agreed, except the last. That the logs were broken up and scattered each time, except the last, by storms. That when the boat took the logs in tow, and had proceeded five or six miles, a storm arose, the tow line parted and the raft lay in the lake a day and night, and was finally nearly all lost, the boat saving a small portion of the raft after the storm was over. And that the weather was pleasant for a sufficient length of time, after the logs were collected, each time, except the last, to enable the defendants to tow the raft to Black Rock, provided the boat had appeared and taken the raft in tow, pursuant to the agreement. That the plaintiff gave notice to the defendants, after the first loss of the raft, and before the contract in relation to collecting the logs at Long Beach, that he would collect the logs together, and that he would not and did not intend thereby to discharge or decrease the liability of the defendants for the loss of the raft. The evidence so offered was objected to by the defendants' counsel, on the ground that it was not admissible under the pleadings; that the 2d, 3d and 4th counts stated no cause of action. Some other objections to the pleadings were made The court admitted the evidence, and the defendants excepted. The defendants objected that the plaintiffs could prove but one neglect, and not four; also, that the agreement being to tow on Sunday, as well as Tuesday or Friday, was

illegal and void. These objections were overruled, and the defendants excepted.

Most of these objections are not now noticed in the defendants' points, and I shall not notice them all, and shall l e brief upon others. The evidence offered was given.

The pleadings are not very clear or accurate; still I think them sufficient. No objection was made to the first count, so called. It concludes with the facts touching the original contract and the first loss. The second count states the agreement relating to the collecting of the logs together at Long Beach, &c., avers performance on the part of the plaintiff at an expense of $75, notice to the defendants, and an allegation that they failed to *deliver* the logs at Black Rock, &c. The other counts are substantially like the second. The counts are not artistically drawn. The pleader seems to have regarded the defendants as liable as common carriers. In my opinion, however, the pleadings were sufficient to justify the giving of the evidence. There is no question of surprise in the case. It is objected that there was no consideration for the second agreement, so called. There is no foundation for this objection. The defendants were to have $100 for towing the raft from Port Maitland to Black Rock, and this sum was paid to them. The truth is that all which was done after the first breaking up and scattering of the raft, was done for the benefit of the defendants, to relieve them from a liability for the entire raft. The raft was lost, the logs were scattered along upon the beach for twenty miles, and it does not appear that there was any market for them where they were. If they could be collected and taken to Black Rock, at an expense less than their value, something might be saved, and this would enure to the benefit of the defendants. The parties came to an agreement about the matter, and the plaintiff collected the logs. I see no objection to regarding this as having been done at the instance of the defendants. They must have desired to save as many of the logs as possible, so as to diminish the damages. It was necessary to collect the logs and fit them for towing, and in consequence of the neglect of the defendants to come with their

boat when notified, and as they had promised, the act of collecting and fitting the logs for towing was necessarily repeated as they were from time to time scattered by the storms. I can see no objections to taking into the account the expenses necessarily incurred in collecting the logs, in estimating the damages. The court charged that if the plaintiff, relying upon the defendants' performance of the contract, made for towing the raft after the same was first scattered, had sustained expenses in and about collecting the same for towing, pursuant to the contract, then if the expenses had been lost to the plaintiff in consequence of the defendants not performing the contracts, the plaintiff was entitled to recover those expenses from the defendants. I think this instruction was proper. The court also charged, that upon the failure of the boat to go at the several times appointed and to take the raft in tow, the raft was at the risk of the defendants. As to the injury from storms against which the plaintiffs could not guard, and that the defendants were liable for injuries from storms, which injuries would not have happened had the defendants performed their agreement, I have already, in considering the liability arising from the breach of the original contract, remarked sufficiently upon this position.

The defendants' counsel presented numerous requests to charge, and upon refusal, excepted. Some of these have been already considered, and the principle upon which the trial was had and was given to the jury, have been sufficiently stated. It remains to notice some other exceptions. The counsel for the defendants requested the court to charge that the raft was at all times in the possession of the plaintiff, and that by leaving Leach in the possession of it, he constituted him his agent in reference to the towing the raft; and that Leach, not objecting to the defendants taking the raft in tow in the afternoon of Tuesday, the defendants were not liable for the injury it sustained in the storm. Refusal and exception. Leaving Leach in possession of the raft did not constitute him an agent of the plaintiff, to modify or change the contract which the plaintiff had made.

I do not think it necessary to notice any further the requests to charge, as the views already expressed, I believe, cover the whole ground and all the questions raised.

There was an objection to the evidence in relation to the contract touching the collecting the logs and the defendants commencing on the Sunday, Tuesday or Friday which should first come after the logs were collected, upon the ground that such contract was illegal, as touching labor on the sabbath. I do not think the question touching the performance of servile labor on Sunday, was necessarily involved; and if it was, I do not think that the case is embraced by the statute which prohibits servile labor or working, excepting works of necessity and charity. If property is exposed to imminent danger, I think it would not be unlawful to preserve it on Sunday, and remove it to a place of safety.

Upon the whole, I am not able to see any errors, of which the defendants can complain, and I think the judgment should be affirmed.

[Erie General Term, September 8, 1856. *Bowen, Greene* and *Marvin*, Justices.]

22 550
39 102
49h 509
54h 466
116a 436

The Bank of Silver Creek *vs.* Talcott and others.

A provision in an assignment made by debtors for the benefit of their creditors, directing the assignees, out of the net proceeds and avails of the assigned property, to pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively for work and labor done for the assignors, will not avoid the assignment, although the names of those creditors, with their places of residence, and the respective amounts due to each, are not mentioned.

An assignment contained a clause directing that by and with the residue and remainder of the net proceeds and avails of the assigned property, if any, the assignees should pay and discharge all copartnership debts and demands of the assignors for which the assignees and A. T. were severally and jointly liable, either as drawer, indorser, guarantor or otherwise: and

in case A. T. H. should be compelled to pay the whole or any part of two drafts for $3000 each, drawn by E. B. H. on B. H. B. and indorsed by the said A. T. H., at the request, and in part for the accommodation of the assignors, then that the assignees should pay to the said A. T. H. the amount that he should be compelled to pay on the said drafts. *Held* that this provision did not vitiate the assignment as showing an intent to hinder, delay or defraud creditors, or as directing the payment of debts not owing by the assignors and not contracted on their account. BOWEN, P. J. dissented.

Held further, that until there was some evidence to show the contrary, it must be presumed that the assignors were bound to indemnify A. T. H., and save him harmless from his indorsement. That in effect they alleged this, in the assignment, and the *onus* was upon the party charging the fraud, to disprove the statement.

Held also, that if the direction to the assignees to pay such amount as A. T. H. should be *compelled* to pay was to be construed as contemplating a defense by A. T. H. and consequent delay, and that the assignees must necessarily wait the termination of proceedings against A. T. H., or until the statute of limitations should attach, the delay was not of that character condemned by the statute.

A direction to the assignees to pay certain sums upon specified notes or drafts, described as being made by other persons, is not controlling evidence of an attempt to appropriate the property of the assignors to the payment of debts other than their own. BOWEN, P. J. dissented.

Where the assignors, by the assignment, profess to devote their property to the payment of their debts, and they proceed to specify a debt, evidenced by the note of a third person, it does not follow that such debt was not their debt to pay, or that they would not be liable to the person who had undertaken to pay it, upon such payment being made.

Where assignors direct that the assigned property be applied to the payment of a note made by a third person, and a creditor of the assignors insists that this is an improper appropriation of the property, and that they have no right to make it, the burthen of proof is upon the creditor.

The simple production of the notes or drafts, with those clauses in the assignment in which they are described, will not prove an improper appropriation of the property of the assignors. The creditor must go further, and prove that the assignors have directed the payment of debts which they were not liable to pay, and for the payment of which they were not liable to indemnify the payors, or makers of the paper.

An assignment directed the assignees to pay $1350, being the amount of a promissory note made by F. & W. and indorsed by the assignors, and discounted by D., S. &. Co. But this sum was not to be paid until F. & W. should have surrendered up and delivered over to the assignees, to be canceled, a note bearing even date with the one last mentioned, for the same amount and maturing at the same time, made by the assignors and payable to the order of F. & W. *Held* that this provision did not show the assignment to be fraud-

ulent, and render it void, as imposing upon D. S. & Co. a condition which they were under no obligation to perform, and which they might be unable to perform. BOWEN, P. J. dissented.

Held also, that there was nothing in the assignment inconsistent with the position that the assignors and F. & W. exchanged notes; and this being so, that there was no evidence of any intention to hinder, delay or defraud any one, and that the *onus* of proving fraud was in the creditor assailing the assignment.

Where an assignment, properly understood, does not prove fraud, and there is no other evidence, the question is whether the provisions of the instrument are such that, when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation.

Fraud should not be presumed from the provisions of an instrument which admits of a contrary construction.

APPEAL by the defendants from a judgment rendered at a special term, adjudging void an assignment made by the defendants, S. V. Talcott and Henry H. Hale, to the defendants, George Talcott and Andrew T. Hale, for the benefit of the creditors of the assignors. The case is sufficiently stated in the following opinion.

Chauncey Tucker, for the plaintiff.

John K. Porter, for the defendants.

MARVIN, J. The learned justice, at the special term, decided that the assignment was fraudulent and void as to the creditors of the assignors, and that the assignment, upon its face, furnished the evidence of the fraud. It will be necessary to examine the assignment with care, as it contains the provisions and evidence relied upon to sustain the judgment. It was made December 13, 1854, by S. V. Talcott of Albany, and H. H. Hale of Buffalo, as partners, and also as individuals. It recites that they are justly indebted, as well individually as copartners, in sundry considerable sums of money which they have become unable to pay and discharge with punctuality or in full, and being desirous of making a fair and equitable distribution of their separate and individual, and also their copartnership, property and effects, among their respective individual and their copartnership creditors; and then follows the sale and trans

fer of their copartnership and individual property to the assignees, in trust nevertheless, and to and for the following uses and purposes. Directions are then given touching the individual property of each of the assignors, and the payment of the debts of each. To these directions there is no objection. The individual property is appropriated to the payment of the individual debts, and the residue, if any, is to be applied to the payment of the copartnership debts of the firm, in the order thereafter directed in the assignment. Then follows the trust relating to the partnership property. It is to be converted into money, the expenses, rents and taxes are to be paid, and with the residue, net proceeds and avails, the assignees are directed, first, to pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively, for work, labor and services, done and performed for the assignors.

The first objection is made to this clause in the assignment. It is argued that the provision necessarily has the effect to hinder and delay the payment of the other creditors longer than they would have been delayed, in case the names of that class of creditors had been mentioned, with their places of residence, and the respective amounts due to each. In my opinion this objection is not sufficient to avoid the assignment. Such a provision is not unusual in assignments, and I am not aware that any objection has been made to it. No authority is cited. In *Rathbun's* assignment there was a similar provision for the payment of clerks, mechanics and daily laborers in the employment of Rathbun at Buffalo and Niagara Falls. (*Pratt* v. *Adams*, 7 *Paige*, 418.) There are also several other clauses in that assignment involving the same principle. It is true, that the question that those provisions avoided the assignment, was not raised.

Objections are taken to the provisions contained in the clauses relating to the fifth and sixth classes of creditors. As to the fifth class the direction is that, by and with the residue and remainder of the net proceeds and avails, if any there should be, the assignees shall pay and discharge all copartnership debts and demands of the said firm of Talcott & Hale, for which the

said parties of the second part, (assignees,) and Angelica Talcott of Albany, are severally and jointly liable, either as drawer, indorser, guarantor, or otherwise howsoever; and in case the said Andrew T. Hale shall be compelled to pay the whole or any part of two drafts for three thousand dollars each, drawn by E. B. Hale on B. H. Buckingham, and indorsed by the said Andrew, at the request of and in part for the accommodation of the parties of the first part, then the said parties of the second part shall pay to the said Andrew T. Hale the amount that he may be compelled to pay on said drafts. In respect to the sixth class the assignees are directed to pay "the following named sums on the following named notes and drafts," viz: twelve hundred and fifty dollars, being the one half of a twenty-five hundred dollar note, made by Fassett & Washburn of the city of Albany, indorsed by the assignors and discounted by Duncan, Sherman & Co., and which note matures on or about the 9th day of January next. Six hundred and sixty-two dollars and thirty-four cents, being the one half of a draft for thirteen hundred and twenty-four dollars and sixty-nine cents, drawn by the said Fassett & Washburn on Baker & Smith of Providence, indorsed by the parties of the first part, and discounted by Duncan, Sherman & Co., and which becomes due and payable on the fourth day of February next. Eleven hundred dollars, being the one half of a draft for twenty-two hundred dollars, drawn by the said Fassett & Washburn on Peter R. Roach, and discounted by the said Duncan, Sherman & Co., and maturing on or about the 5th day of February next. Thirteen hundred and fifty dollars, being the amount of a promissory note, made by said Fassett & Washburn, payable to the order of, and indorsed by, the said parties of the first part, and discounted by the said Duncan, Sherman & Co., and falling due on or about the 15th day of January next; but this last mentioned sum is not to be paid until the said Fassett & Washburn shall have surrendered up and delivered over to the parties of the second part, to be canceled, a note bearing even date with the one last mentioned, for the same amount, and maturing at the same time,

made by the said parties of the first part, and payable to the order of the said Fassett & Washburn.

Several objections are made to these provisions. It is insisted that the assignors have provided for the payment of debts which they did not owe. In other words, that they have devoted their property to the payment of the debts of other persons, which they, the assignors, were not liable to pay. If the assignors by the assignment, have appropriated their property to the payment of debts not owing by them, and not contracted on their account, to the exclusion and prejudice of their own creditors, it cannot be doubted that the assignment is fraudulent and void as to their creditors. There can be no dispute about the law of such a question. Counsel do not differ about it. The difference is touching the fact, and both parties refer to, and rely upon, the assignment itself for the evidence of the fact.

After a careful examination of the pleadings and the assignment, I have come to the conclusion that the learned justice, at the special term, erred in finding, from the evidence, that the assignors had provided for the payment of any debts other than their own. The *onus* of showing the assignment fraudulent, was upon the plaintiff. Fraud is not to be presumed, but there must be proof of it, and the plaintiff relies upon the face of the assignment for the proof. It is said that the direction to pay certain sums upon certain notes or drafts, which notes or drafts are described as being made by other persons, is controlling evidence of an attempt to appropriate the property of the assignors to the payments of debts other than their own. It may be conceded that upon the production of a note made by John Doe, the presumption would be that he alone owed the debt; and in the absence of other evidence, there would be no presumption that he had contracted the debt on account of any other person, or that any other person was liable to indemnify him. But the present case differs from the case supposed. Talcott & Hale, the assignors, speak in the assignment, and their declarations are resorted to as evidence. And what do those declarations prove? They begin, by declaring, in substance, their insolvency; that they are indebted individually and as partners; that they

desire to make a fair and equitable distribution of their property among their creditors; they then proceed to sell and transfer their joint and several property, upon certain trusts No doubts arise upon the trusts relating to their individual debts. The residue, if any, of Talcott's individual property, is directed to be applied "to the payment of the *copartnership debts of the firm above mentioned,* in the order hereinafter directed and provided." The same provision is inserted in reference to the separate debts and property of H. H. Hale. Thus far all is clear and expressed. Then follows the trust relating to the "property and effects belonging to the said partnership or firm of Talcott & Hale, hereby also assigned." The assignees are to convert the property into money, and with the proceeds pay expenses, rents, taxes, &c. and with the residue, first pay the laborers, &c. for work, &c. done for the assignors. No doubt arises here about the debt being the proper debt of the assignors. But in some of the subsequent clauses and classes of creditors, it is not clearly expressed that the debt to be paid was the debt of the assignors; and from the description of the evidence of the indebtedness, it is alleged that it is proved that the debts were not the proper debts of the assignors. In my opinion this is not a fair construction of all that Talcott & Hale have said. We must look to the whole instrument. It professes to devote their property to the payment of their debts. And it does not follow, when they specify a debt, evidenced by the note of a third person, that such debt was not their debt to pay, or that they would not be liable to the person who had undertaken to pay it, upon such payment being made. The question does not arise, as it would, if the maker of one of the notes, which the assignors direct to be paid, had paid the note, and then sued Talcott & Hale for money paid for their use. In such suit the plaintiff would be obliged to give evidence to show that they made the note for the use of Talcott & Hale. As the question now arises, Talcott & Hale purpose to pay the note made by the third person, or rather they direct that their property be applied to the payment of such debt, and the plaintiff, a creditor, says they have no right to do this. Upon whom is the burden of

proof? Clearly, upon the party alleging that it is an improper appropriation of the property of the assignors. And the simple production of the notes or drafts with those clauses in the assignment in which they are described, will not prove an improper appropriation of the property of the assignors. The plaintiff should have gone further, and proved that the assignors had directed the payment of debts which they were not liable to pay, and for the payment of which they were not bound to indemnify the payors or makers of the paper.

On consulting the complaint, it will be found that it is extremely meager, touching any question of fraud. It is alleged that the assignors continued in possession of the assigned property. This is denied in the answer. The plaintiff says that he "is advised and charges that the said assignment is merely colorable, and was made with intent to hinder, delay and defraud the creditors of Talcott & Hale." This is denied in the answer. There is no allegation that the assignors had provided for the payment of debts other than those they owed. The assignment is referred to and copied. I doubt whether the point or question we are considering ever occurred to the defendants until it was raised upon the argument at special term. However this may be, both parties rely upon the assignment as proof of their positions, or rather the plaintiff relies upon it as proving its position that the assignors have misapplied their property, and thus attempted to defraud their creditors. In my opinion, the assignment fails to prove it.

In the fifth class the assignees are directed to pay the company debts of the firm of Talcott & Hale, for which the assignors and Angelica Talcott are severally and jointly liable, as drawer, indorser, guarantor or otherwise; and in case Andrew T. Hale shall be compelled to pay the whole or any part of two drafts for $3000 each, drawn by E. B. Hale on B. H. Buckingham and indorsed by the said Andrew, at the request of and in part for the accommodation of the parties of the first part, then the assignees shall pay to the said Andrew T. Hale the amount that he may be compelled to pay on said drafts. It is argued by the plaintiff, that this provision shows an in

tent to hinder and delay, and also an intent to defraud. These drafts were made by E. B. Hale. They were drawn upon Buckingham. Whether they had been accepted, does not appear. They were indorsed by Andrew T. Hale, at the request of and, the assignment stated, in part for the accommodation of the assignors, and the direction is to pay A. T. Hale the amount he may be *compelled* to pay. It is objected that this was not the debt of the assignors, &c. I have already expressed my opinion touching this objection. It is also said that as the assignees are only to pay such amount as A. T. Hale shall be *compelled* to pay, the assignment contemplated a defense by A. T. Hale, and consequent delay, and that the assignees must necessarily wait the termination of proceedings against Andrew, or until the statute of limitations attaches to the demand. Until there is some evidence to show the contrary, we must suppose that the assignors were bound to indemnify Andrew, and save him harmless from his indorsement. In effect they say this, and there is no evidence to the contrary, and the *onus* was upon the party alleging the fraud. It is stated that the indorsement was at the request of the assignors, and in part for their accommodation. What is meant by the last clause is not very clear. If the assignors had borrowed the draft of the drawer, E. B. Hale, and requested Andrew to indorse it, they would be liable to pay Andrew any sum he should be obliged to pay. It is, however, claimed that the language, "in part for the accommodation of the assignors," is an admission or declaration showing that they could not be liable to Andrew for the whole amount of the drafts, should he be compelled to pay the whole amount. It is clear that the indorsement was made at the request of the assignors, and in part for their accommodation, and this would constitute a good consideration for an implied undertaking to indemnify the indorser. But to my mind the most satisfactory answer to the objection is, that the assignment does not furnish satisfactory evidence that the assignors had directed the payment of debts other than those which they were bound to pay, and the burden of proving fraud was upon the plaintiff. But to return to the

special objection, that this provision necessarily interposed delay. The delay was not of that character condemned by the statute. The liability of Andrew T. Hale was contingent. He might not be compelled to pay any thing; and if not, then the assignees were not to pay him.

In the sixth class there is a direction to pay $1350, being the amount of a promissory note made by Fassett & Washburn, indorsed by the assignors and discounted by Duncan, Sherman & Co.; but this last mentioned sum is not to be paid until Fassett & Washburn shall have surrendered up and delivered over to the assignees, to be canceled, a note bearing even date with the one last mentioned, for the same amount and maturing at the same time, made by the assignors, and payable to the order of Fassett & Washburn. It is insisted that this provision shows the assignment fraudulent, and renders it void. That a condition is here imposed upon the creditor, which the law will not allow, and one which Duncan, Sherman & Co. were under no obligation to perform, and which it might be out of their power to perform. It is undoubtedly true that the debtor cannot make terms in his assignment which shall result to his benefit, or impose conditions upon the creditor which the law has not imposed, and which shall delay and hinder him. The positions of law, as advanced by the plaintiff's counsel, are sound, but have they any application to the case before us?

The assignees are directed to pay $1350, being the amount of a promissory note made by Fassett & Washburn, indorsed by the assignors and discounted by Duncan, Sherman & Co. It may be remarked that the direction is not to pay the note, or to pay Duncan, Sherman & Co., but to pay the amount of the note. The note was to mature in about a month after the assignment was made, and Fassett & Washburn were the makers. They were a firm doing business in Albany, and the presumption was that this firm was responsible. They were liable to Duncan, Sherman & Co. and could be compelled to pay. I cannot, therefore, well understand how the assignors could have designed to hinder and delay Duncan, Sherman & Co., or how the condition could affect them, as the holders of the note.

If we regard this provision as designed for the benefit of Fassett & Washburn, then there can be no objection to the condition, provided the note held by Fassett & Washburn represented the note made by them and discounted by Duncan, Sherman & Co. If the parties exchanged notes, then the payment by the assignors, of the note made by Fassett & Washburn, would entitle them to the note they had given to Fassett & Washburn. The effect of the provision and condition was the same as though provision had been made for the payment of their note given to Fassett & Washburn, and nothing had been said of the note made by Fassett & Washburn and discounted by Duncan, Sherman & Co. There is nothing in the language of the assignment inconsistent with the position that the assignors and Fassett & Washburn exchanged notes; and this being so, there is no evidence of any intention to hinder, delay or defraud any one. I think the provision, including the condition, suggests this view of the case. Now we must keep in mind, constantly, that the onus of proving fraud was upon the plaintiffs, and they give no proof, aside from the assignment, and that will bear a construction entirely consistent with honesty and fair dealing; and the condition was not only proper, but without it the circumstances were such that the matter may have been open to the imputation of providing for the payment of the same debt twice, to the prejudice of the last class of creditors.

In the assignment it is declared that inventories of all the property assigned shall be made, with all reasonable dispatch, and be annexed and considered a part of the instrument. It is objected that these inventories were not made. I do not so understand the evidence. Cagger, in his affidavit—made evidence by stipulation—says that the schedules were made and annexed to the assignment. This affidavit was not to be used, except for the purpose of disproving fraud not apparent on the face of the assignment. The clause in the assignment relating to inventories does not prove fraud. It is very different from that contained in the assignments referred to by the counsel. (*Averill* v. *Loucks*, 6 *Barb.* 470. *Riggs* v. *Murray*, 2 *John. Ch. R.*

565.) In the present case there was no right reserved to the assignors to give future preferences.

In my opinion the plaintiff has failed to show fraud, in the present case. The assignment, properly understood, does not prove it, and there is no other evidence. The question is, whether the provisions of the instrument are such, that when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation. We should not presume fraud from the provisions of an instrument which admits of a contrary construction. (*Ward* v. *Tingley*, 4 *Sandf. Ch. R.* 480. *Brigham* v. *Tillinghast*, 15 *Barb.* 618, 620. *Jacobs* v. *Allen*, 18 *id.* 550. *Kellogg* v. *Slauson*, 15 *id.* 56. *S. C.* 1 *Kernan*, 304. *Jewett* v. *Woodward*, 1 *Edw. Ch. R.* 197. *Archibald* v. *Thomas*, 3 *Cowen*, 284.)

The judgment of the special term should be reversed, &c.

Mullett, J., concurred.

Bowen, P. J., dissented.

Judgment reversed.

[Erie General Term, September 8, 1856. *Bowen*, *Mullett* and *Marvin*, Justices.]

Wright and others *vs.* Boughton and others.

The defendants were common carriers from Lewiston to Niagara Falls by trains and wagons, but had no interest in, or connection with, any of the carrying business or companies beyond the falls. The Buffalo and Niagara Falls Rail Road Company carried goods and passengers between the falls and Buffalo and goods destined for Detroit and places on the Michi.an Central Rail Road were, at Buffalo, usually shipped upon some boat to Detroit, &c. The course of business, in this respect, was generally known. The defendants received from the plaintiff, at Lewiston, two quarter casks of brandy, and gave the following receipt: "Received, Lewiston, Aug. 12, 1852, from W., C. & Co. of, &c. the following packages of goods on board the L & B. R. line, in good

order, to be delivered in like good condition." In the left hand margin, under this, was "Israel Kellogg, Kalamazoo, Mich. M. C. R. R." and opposite, on the right hand, "1 qr. cask brandy." Below this address was the following: in the left hand margin, "McCrea & Morton, Battle Creek, Mich. M. C. R. R." and opposite, at the right hand, "1 qr. cask brandy." Shipping bills were signed by W., C. & Co. corresponding with this receipt. Cards were put upon the casks, marked upon one, thus: "Israel Kellogg, Kalamazoo, Mich. M. C R. R." and upon the other, "McCrea & Morton, Battle Creek, Mich. M. C. R. R." The casks of brandy were duly delivered by the defendants to the Buffalo and Niagara Falls Rail Road Co. at the falls, and that company transported them to Buffalo and shipped them on board a steamer of the Michigan Central Rail Road line, and the steamer and brandy were lost and sunk, in Lake Erie. *Held* that the receipt, signed by the defendants, did not contain any agreement to transport the casks of brandy to Kalamazoo or Battle Creek, but that it was only intended to embrace the route occupied by them as common carriers, the address being incorporated in the instrument merely for the purpose of identification; and that the defendants were not liable for the loss which occurred after the property had passed out of their hands.

APPEAL from a judgment entered upon a verdict. The questions came up upon exceptions taken on the trial. It was alleged in the complaint that the defendants were common carriers between Lewiston, in New York, and Battle Creek and Kalamazoo, in Michigan. That in August, 1852, the plaintiffs entered into a contract with the defendants to carry, transport and deliver safely, two quarter casks of brandy, one of them to be delivered at Kalamazoo, and the other at Battle Creek, in Michigan, in good order and condition. That the said casks of brandy were delivered to the defendants, at Lewiston, so to be transported and delivered as aforesaid. Averment of neglect to transport and deliver, and of loss, &c. There were other counts stating that the defendants were common carriers between Lewiston and Buffalo, and also between Lewiston and Detroit, and that agreements were made to carry the brandy from Lewiston to Buffalo, and also from Lewiston to Detroit, with averments of neglect and loss. The defendants put in issue the allegations in the respective counts, and alleged that they received the casks of brandy at Lewiston, to be by them transported from Lewiston to Niagara Falls, and to be there delivered to the Buffalo and Niagara Falls Rail Road Company

and averred performance. They also alleged that they carried the brandy to Buffalo and delivered it to the Michigan Central Rail Road Company; that it was shipped on board the steamer Atlantic, to be transported to Detroit; that the Atlantic and brandy were, on the trip, lost and sunk.

The plaintiffs were partners, and joint owners of the brandy. The defendants were partners in transporting goods and passengers between Lewiston and Niagara Falls by wagons. The defendants proved, upon the trial, the following instruments:

"Received, Lewiston, Aug. 12, 1852, from Wright, Clark & Co. of Queenston, C. W., the following packages of goods on board the L. & B. R. line, in good order, to be delivered in like good condition.

Isaac Kellogg,
Kalamazoo,
Mich.
M. C. R. R. } 1 Qr. Cask Brandy.

Also for

McCrea & Morton,
Battle Creek, Mich.
M. C. R. R. } 1 Qr. Cask Brandy.

R. H. Boughton."

Also a shipping bill.

"Shipped, Lewiston, August 12, 1852, in good order, and so to be delivered, to wit:

One qr. cask of brandy, marked Israel Kellogg, Kalamazoo, Michigan.

Freight to Falls $0.38.

M. C. R. R. Wright, Clark & Co."

"Shipped, Lewiston, August 12, 1852, in good order, and so to be delivered, one qr. cask of brandy, marked McCrea & Morton, Battle Creek, Michigan.

M. C. R. R. Wright, Clark & Co.

Freight to Niagara Falls $0.38."

The shipping bills were in the handwriting of the plaintiffs, excepting the words "freight to the Falls," which were written

by the defendant Boughton when he forwarded the bills to the falls. The quantity and value of the brandy were proved. Cards were put upon the casks, marked upon one thus: "Israel Kellogg, Kalamazoo, Mich., M. C. R. R.;" upon the other, "McCrea & Morton, Battle Creek, Michigan, M. C. R. R." Kalamazoo and Battle Creek are on the line of the Michigan Central Rail Road. The casks and brandy were duly delivered by the defendants to the Buffalo and Niagara Falls Rail Road, at the falls, and that company duly transported them to Buffalo, and shipped them on board the Atlantic, on the Michigan Central Rail Road line, and the Atlantic and brandy were lost and sunk in the lake. There was no connection or interest in business between the defendants and any other company or line. Their business was to carry goods to the falls, to the Buffalo and Niagara Falls Rail Road, and receive goods at the falls and carry them to Lewiston; and such was the general understanding.

When the plaintiffs rested, the defendants asked for a nonsuit, assigning various grounds. The motion was denied, and the defendants excepted. The defendants requested the court to charge, 1st. That the receipt was no proof that the defendants were common carriers only from Lewiston to the falls, and that they must find a verdict for the defendants; 2d. That if the jury found that the defendants carried the goods from Lewiston to Niagara Falls, so that they might be forwarded by the Buffalo and Niagara Falls Rail Road Company, as directed in the shipping bill, then they must find for the defendants. Refusal and exception. The court directed the jury to find a verdict for the plaintiffs, and the defendants excepted. Verdict for the plaintiffs, and appeal by the defendants.

F. P. & A. G. Stevens, for the appellants.

D. Tillinghast, for the respondents.

By the Court, MARVIN, J. It is claimed by the plaintiffs, that the defendants entered into a contract to carry and transport the brandy, one cask to Battle Creek and the other to

Kalamazoo, Michigan, and that such contract was evidenced by the instruments dated August 12. One of these instruments was signed by Boughton—(it is conceded that if he became liable, all the defendants were liable)—and was delivered to the plaintiffs; the others were signed by the plaintiffs, and were delivered to the defendants. It is claimed that these instruments constituted the contract between the parties. What do these written instruments prove? In endeavoring to ascertain their meaning, and in giving construction to them, we should understand the subject to which they relate, and the circumstances connected with their making. We learn the facts thus existing *aliunde*. The plaintiffs had two casks of brandy at Lewiston, the business residence of the defendants, and desired that they should be transported to certain places in Michigan. The defendants were common carriers from Lewiston to Niagara Falls, a distance of some seven miles, by trains and wagons. The Buffalo and Niagara Falls Rail Road Company is a corporation engaged in carrying goods and passengers between the falls and Buffalo, a distance of over 20 miles. Goods at that time destined to Detroit and places on the Michigan Central Rail Road were, at Buffalo, shipped upon some boat to Detroit, &c. The defendants had no interest in, or connection with, any of the carrying business or companies beyond the falls. Their business was confined exclusively to carrying passengers and goods between Lewiston and Niagara Falls. These facts and the course of business were generally known, and undoubtedly known to the plaintiffs. The defendants gave a receipt, "Received, Lewiston, Aug. 12, 1852, from Wright, Clark & Co. of Queenston, C. W., the following packages of goods on board the L. & B. R. line, in good order, to be delivered in like good condition." In the left hand margin, under this writing, we have "Israel Kellogg, Kalamazoo, Mich., M. C. R. R." and opposite to this, at the right, "1 qr. cask brandy." Below the above address we have, in the left hand margin, "McCrea & Morton, Battle Creek, Mich., M. C. R. R.," opposite to this at the right, "1 qr. cask brandy." These addresses in the margin are the same as those upon the cards put upon the casks by the plain

tiffs. The receipt acknowledges that the casks were received in good order, "to be delivered in like good order;" but it is not declared to whom or where the delivery is to be made. In a bill of lading the place where, and person to whom, the delivery is to be made, are usually specified or clearly indicated. (*See the form in Abbott on Shipping*, 322.) Sometimes the place of delivery and the person to whom the delivery is to be made, are indicated by a reference to the address on the margin.

In this case there is no such reference when speaking of the delivery. There is a reference in the body of the receipt, "the following packages of goods," and we find that they are "1 qr. cask brandy, also for 1 qr. cask brandy," and these specifications of the articles are connected with the addresses in the margin and the indication of the mode of transport in Michigan, viz. M. C. R. R. In my opinion this instrument does not contain any agreement to transport the cask of brandy to Kalamazoo or Battle Creek; no such agreement is *expressed.* It can only be inferred from the fact that it contains the address or direction, copied from the direction upon the respective cards put upon the casks. These were copied into the receipt for the purpose of identifying the "following packages of goods." Suppose in the body of the receipt the language had been the packages of goods *marked* as follows, there would then have been no doubt of the meaning of the instrument, and it would not have been insisted that the defendants were liable. (6 *Hill*, 157.) In my opinion the instrument should be so construed; that is, the address, &c. was incorporated in the instrument for the purpose of identification, and the parties had no idea that the defendants were entering into a contract to transport the casks of brandy beyond the route occupied by them as common carriers.

This view is greatly strengthened, if not rendered conclusive, by consulting the shipping bills signed by the defendants and delivered to the plaintiffs. Thus, "Shipped, Lewiston, August 12, 1852, in good order, and so to be delivered, to wit: one qr. cask brandy, *marked* Israel Kellogg, Kalamazoo, Michigan, M. C. R. R." Here we have the reference to the address

clearly for the purpose of identification. These shipping bills were sent along with the goods as indicating, to the different carriers, the route the goods were to take and their destination.

In *Van Santvoord* v. *St. John*, (6 *Hill*, 157,) the receipt given by the carrier was like the one in the present case, with this difference. In that the word *marked* preceded the address as copied into the receipt. In that case the carrier transported goods between New York and Albany. The goods were addressed to J. Petrie, Little Falls. The goods were delivered by the defendants to a canal boat, and some of the goods were purloined. The supreme court held that the defendants were liable; that by their contract they were bound to transport the goods to Little Falls. (*See the case*, 25 *Wend.* 660.) The court for the correction of errors reversed the judgment, and held that the defendants were only bound to carry the goods safely over their route and deliver them to the next carrier. And the court held that evidence of the custom and course of the carrying business was proper. The case is an authority for the views I have taken. There was no express agreement that the defendants should transport the goods to the place designated in the address, and such agreement should not be inferred, or rather the written instruments should not, under the circumstances disclosed, be construed as containing such agreement. The judgment should be reversed, and there should be a new trial; costs to abide the event.

[Erie General Term, September 8, 1856. *Bowen*, *Greene* and *Marvin*, Justices.

22 568
46 187
2L 213
8[illegible] 325
4[illegible] 263
46 578
46h 602

FOBES *vs.* SHATTUCK.

Where personal property, severable in its nature, in common bulk, and of the same quality, is owned by several persons, as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it, without being liable to them, in an action for the conversion of the common property.

C. raised wheat upon the plaintiff's land, on shares, under an agreement by which C. was to harvest and thrash the wheat, and the plaintiff was to take his half of it at his barn, in the half bushel, and C. was to have the other half. Before the wheat was harvested, C. sold his interest in it to the defendant, S. When the wheat was fit to be harvested S. proceeded to cut it, divide it in the sheaf, in the field, to draw one half of the sheaves into his own barn and to put the other half into the plaintiff's barn. The plaintiff forbade his cutting or drawing the wheat, and claimed it all as his own. S. drew away what he claimed as his share—about one half the sheaves—and the plaintiff took what S. had left. In an action of trover against S. for the conversion of the wheat, *Held* that the plaintiff could recover no more than the value of his share of the wheat taken by S. That although it appeared that S. took only his half of the crop, yet that, to be entitled to that, he was bound to thrash and clean the plaintiff's half, and deliver it at his barn by measurement. And that if the wheat was to be considered as divided in the sheaf, then S. got more than his share, by the value of the labor necessary to thrash and clean the plaintiff's half.

Held further, that the performance of this labor by S. being prevented by the act of the plaintiff in claiming the whole of the wheat, and taking, thrashing and disposing of his own half as divided by S., and in taking possession of the field, the plaintiff might be considered as waiving the performance of any further acts by S. as a tenant in common, and as electing to rely upon his ownership of the whole of the wheat.

Where a farm is let on shares, for cultivation, and wheat is raised thereon, by the tenant, the straw is a part of the crop, and belongs to the owners thereof; unless there is some stipulation or custom to the contrary.

It does not necessarily belong to the farm, nor is there any general usage requiring it to be used, as manure, upon the land where it grew.

THIS was an appeal from a judgment entered upon the report of a referee, bringing up certain exceptions taken upon the hearing. The action was for converting a quantity of unthrashed wheat and straw of the plaintiff. The answer denied every allegation in the complaint; claimed property in the wheat and straw in the defendant, and also a license from the plaintiff to take it. The referee made his report in favor of

the defendant, upon which judgment was entered. It appeared that the wheat which was the subject of the action was raised on the plaintiff's land, by William Cleland, upon shares. That Cleland was to harvest and thrash the wheat and the plaintiff was to take his half of it, at his barn, on his farm, in the half bushel, and Cleland was to have the other half. Before the wheat was harvested, Cleland sold his interest in it to Shattuck, the defendant. When the wheat was fit to be harvested Shattuck proceeded to cut it, divide it in the sheaf, in the field, to draw one half of the sheaves into his own barn, which was on an adjoining farm, and to put the other half into the plaintiff's barn. While he was thus employed the plaintiff came to him, forbade his cutting or drawing the wheat, and claimed it all as his own. Shattuck did draw away what he claimed as his share, and the plaintiff took, and drew into his own barn, what sheaves Shattuck had left, and raked the field.

J. L. Brown, for the appellant.

Wm. G. Bryan, for the respondent.

By the Court, MULLETT, J. This presents an inquiry into the rights and liabilities of tenants in common of personal property. Tenants in common are said to be seised or possessed of the subject of the tenancy *per my et per tout*, by the moiety and by all; having each the possession as well of every part as of the whole. Consequently, one tenant in common cannot maintain an action of trespass or trover against his co-tenant, for the thing held in common, merely for taking and holding it. (2 *Caines' R.* 166. 2 *John.* 468. 3 *id.* 175. 15 *id.* 179. 9 *Wend.* 338.) As a general rule, the property held in common cannot be divided, unless by the consent of all the owners. One tenant in common cannot set apart a portion of the common property, for his co-tenant, and hold the remainder as his own, however just may be the division. (4 *Wend.* 530.) This must be so, when the property held in common consists of several things of different qualities or value, or where it embraces

but one thing, which cannot be divided without destroying its nature or identity. One tenant in common can sell and convey his interest in the joint property, and the purchaser will become a tenant in common with the other owners, subject to the rights and obligations of the person whose interest he has purchased. By the civil law tenants in common were under an implied engagement to divide the property held in common, when any one of the parties concerned desired it. (*Domat, B.* 2, *tit.* 5.) By several ancient English statutes, the same result might be attained in respect to real property, by the aid of the court of chancery. (*Coke's Inst. by Thomas, vol.* 1, *p.* 789, *n.* 20.) The substance of these statutes was early adopted in this state, and is still continued. (2 *R. S.* 242, 2*d ed., and references.*)

Mr. Justice Johnson, in delivering the opinion of the court in the case of *Tripp* v. *Riley*, (15 *Barb.* 334,) says: "The common law gave tenants in common, of personal property, no remedy by any legal proceedings for partition. They were compelled to resort to equity when they could not agree upon severance of their respective interests, and the common property was not in its nature severable. But I apprehend that the right of severance, amongst tenants in common, by one tenant, of his share, always existed at common law, as to all property in its nature severable. That partition of personal property, held in common, was always a matter of absolute right, both by the civil and common law; and might be called for by either tenant, at any time." And the learned judge gave it as his opinion that where personal property, severable in its nature, in common bulk, and of the same quality, is owned by several as tenants in common, each tenant may go and sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it without being liable to them, in an action for the conversion of the common property. It appears that this opinion of Judge Johnson was adopted by the learned court of the 7th district, at a general term, who allowed the plaintiff to recover for his individual share of a quantity of thrashed wheat held by him in common with another, and which had been taken and carried away by the de-

fendants, who had no interest in the wheat, but were mere strangers and wrongdoers; the non-joinder of the other owner not having been pleaded in abatement. But this decision does not authorize one tenant in common to do any thing to the common property which may diminish its value as a whole, or injure or endanger the interest of his co-tenants; such as severing and converting a portion of a growing crop of grain, before it is ready for harvest or ultimate use; severing and converting part of a number of animals in the process of fattening, to be butchered for sale or food; or severing and converting a portion of any common property in the process of being improved for the benefit of the owners. (4 *Wend.* 530, *above cited.*) In such cases each tenant owes to the other tenants his exertions, according to the nature and terms of his connection with them, for the preservation and improvement of the common property; and the property, as between them, is not severable until its maturity. In the case under consideration, it is not denied that the wheat was ripe and ready for the harvest. It was the defendant's duty to harvest, thrash and clean it, and to deliver one half of it to the plaintiff, at his barn on the farm, measured in the half bushel. Instead of taking all the wheat to the plaintiff's barn, to be threshed and cleaned there, the defendant was proceeding to divide it in the sheaf, and to take one half to his own barn, and the other to the plaintiff's, when the plaintiff came, claimed the whole wheat as his, forbade the defendant's drawing or touching any of it, and procured the defendant and the men in his employ to be arrested, for what they had done. It is true that the plaintiff was entitled to have his half of the wheat, when thrashed, delivered to him in the half bushel, at the barn on his farm, but I do not see any thing in the terms or nature of his contract with Cleland that requires that the whole crop of wheat should be thrashed there. Suppose the defendant had cut, thrashed and cleaned the wheat with the same machine, at the same time, in the field, and then delivered the plaintiff's half to him, by measurement, at his barn, would he have had any reason to complain, or to claim the other half of the wheat as a tenant in common with the defendant? All the labor ne-

cessary to harvest and fit the wheat for a division was to be done by the defendant, and it is not easy to understand why he might not take a part of the wheat in the sheaf into the plaintiff's barn, and a part into his own, near by, to be thrashed, and afterwards measure and deliver to the plaintiff his half of the cleaned wheat, at his own barn. It appears that the defendant was proceeding to do this, when he was stopped, and prevented by the claim and conduct of the plaintiff, which might have amounted to a constructive conversion, on his part, of the whole crop of wheat. The referee found, as matters of fact, that the defendant did cut, take, carry away and convert what was by estimate one undivided half of the wheat; and that the plaintiff took, and carried away, the other undivided half thereof. That the defendant had no more of the wheat than he was entitled to. And upon these facts he reported in favor of the defendant. There was no evidence to sustain the assumption of the plaintiff that he owned the whole wheat. It belonged to him and the defendants as tenants in common, and so the referee found. As this was an action of trover, for the conversion, by the defendant of a quantity of wheat, belonging to the plaintiff, he could recover no more than the value of his share of the whole wheat taken by the defendant. It appears that the defendant got no more than his half of the whole wheat; but to be entitled to that, he was bound to thrash and clean the plaintiff's half and deliver it at his barn, by measurement. If the wheat was to be considered as divided in the sheaf, then the defendant got more than his share, by the value of the labor necessary to thrash and clean the plaintiff's half. There was evidence tending to prove that the performance of this labor, by the defendant, was prevented by the plaintiff, who claimed the whole wheat, and took, thrashed and disposed of his own half as divided by the defendant, and took possession of, and raked the field. By this claim and conduct the plaintiff might have been considered as waiving the performance of any further acts by the defendant, as a tenant in common, and electing to rely upon his ownership of the whole wheat. This appears to have been the view taken of the

matter by the referee, and I see no error in his finding, as respects the grain.

The plaintiff, at the trial and on the argument of the appeal, claimed all the straw as his, and demanded judgment against the defendant for carrying away and converting one half of it. of the value of $20. The plaintiff's claim to the whole of the straw is founded on the assumption that, by the practice of good husbandry, the straw of wheat is spread upon the land where it grew, to repair the soil, and is therefore to be considered in law as manure. In the case of *Middlebrook* v. *Corwin*, decided in 1836, Mr. Justice Nelson, giving the opinion, (15 *Wend.* 169,) the court held that where a farm is taken by a tenant, for agricultural purposes, the manure made upon it belongs to the farm, and not to the tenant, and at the expiration of his term the tenant has no right to remove or dispose of it. This was a case between landlord and tenant, and related to the manure produced by twenty cows, a pair of working oxen, and other cattle, put on the farm by the landlord, and which was sold by the tenant to the defendant, and taken from the barn-yard, on the farm, shortly before the expiration of the tenant's term. In the case of *Goodrich* v. *Jones*, decided in 1841, Cowen, J. delivering the opinion, (2 *Hill*, 142,) it was held that manure lying in a barn-yard, on a farm, at the time of the conveyance, though laid up in heaps, passed by the conveyance of the farm to the purchaser. (*See the cases referred to by Judge Cowen.*) The correctness of those decisions is not doubted, but it is denied that wheat straw is embraced by the term *manure*, as used in those cases; or that it is shown to be so uniformly used by farmers to enrich their land, as to constitute a reservation of it for that purpose an implied stipulation on the part of the landlord who lets his land for agricultural purposes. Admitting that the defendant was under an implied engagement to use the plaintiff's land according to good husbandry, there was no proof that good husbandry in that section of country or neighborhood required the straw to be used upon the land, as manure. (4 *East*, 154.) As remarked by Mr. Justice Nelson, in the case of *Middlebrook* v. *Corwin*, what may be good husbandry in re-

spect to one particular soil, climate, &c. may not be so in respect to another. Besides, straw is valuable for other purposes besides manure, and is frequently the subject of sale, as personal property. Upon the whole I think the straw is a part of the crop, and belongs to those who own the crop; unless this principle is controlled by some stipulation or custom to the contrary and none was shown in this case. The finding of the referee was therefore right in reference to the straw.

The judgment appealed from must be affirmed.

[Erie General Term, November 13, 1854. *Marvin*, *Mullett*, *Bowen* and *Greene*, Justices.]

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22 574
37 518
39h 173

Terry *vs.* The New York Central Rail Road Company.

In actions brought to recover damages for an injury alleged to have been occasioned by the negligence of the defendant, whether the defendant be an individual or a corporation, to entitle the plaintiff to recover, he must show some fault on the part of the defendant. And that fault will not be inferred merely from the injury; unless the defendant is a common carrier of persons and the plaintiff was a passenger.

The plaintiff in such an action cannot succeed if it appears that his own misconduct co-operated with the wrongful act of the defendant, to produce the injury complained of.

The plaintiff cannot succeed if it appears that the injury complained of was received by him while he was trespassing upon the defendant, without proving that such injury was willful and intentional, on the part of the defendant.

Where a fence, between a rail road and the adjoining farms, which it is the duty of the land owners to keep in repair, is destroyed by fire communicated by the engines in use upon the rail road, and the rail road company neglects to rebuild such fence, this will not render the company liable for the value of a horse which strays upon the track of the road from an adjoining pasture where it is kept, through the open fence, and is killed by the engine.

Although the rail road company may be liable to pay the owners of the fence the damages occasioned by the burning thereof, they are under no legal obligation to repair it, under such circumstances; nor have the owners a right to abandon the rest of their property, and charge the rail road company for all the damages they may sustain by reason of such neglect or abandonment, while the fence remains unrepaired.

And if an individual suffers his horse to run at large in a pasture adjoining a rail road, between which and the rail road there is no fence, without showing any legal reason or excuse therefor, this is such carelessness and negligence on his part, that if the horse goes upon the rail road track and is killed, without any willful negligence by the rail road company or its servants or agents, he can have no remedy against the company.

Where a rail road company, which cannot become entitled to the possession and use of land required for the purposes of its road, except on the payment of the damages sustained by the several proprietors, by the appropriation of their land, lays out its road through a farm, causes the damages to be assessed, and takes possession of the land required for its road, and continues in the public and undisturbed possession thereof for several years, this is *prima facie* evidence that it has paid to the land owner the amount of the assessment.

THIS was an appeal from a judgment of the county court of Genesee county, reversing a judgment of a justice's court. The action was brought in the justice's court, in February, 1853, by Van Rensselaer Terry against the rail road company, to recover damages for killing a horse. In his complaint the plaintiff alleged that the defendants were a rail road company, existing and transacting business under the statutes of this state. That on the 8th day of December, 1853, at Batavia, the plaintiff owned a valuable horse, which, on that day, the defendants by their servants and agents carelessly and negligently ran upon, with an engine and train of cars, and killed. That the said horse was then being kept and pastured upon the premises of the plaintiff, adjoining the defendants' rail road. That prior thereto the defendants' locomotive engine, through the carelessness and negligence of the defendants' servants and agents, had burned down and destroyed the fences between the said track and the premises of the plaintiff, by means of which the horse escaped upon the track of the defendants, and was killed, as above mentioned, to the plaintiff's damage of $100, for which sum he claimed judgment.

The defendants, in their answer, denied each and every allegation contained in the complaint, generally and specifically, except, that they were a rail road corporation, and averred that if any damage was done, in the manner described in the complaint, it was for the want of fences which the plaintiff, or the

owner of the land, was bound to build and keep in repair, himself. On the trial, before the justice and a jury, in March, 1853, the plaintiff gave evidence tending to show that at the time of killing the horse, and at the time of the trial, he owned and occupied a piece of land adjoining the defendants' rail road. That Hollister, the witness, sold this piece of land to the plaintiff, in February, 1852. That the whole lot owned by Hollister contained about six acres, and was over 30 rods on the rail road. That the plaintiff owned one acre, which was about five or six rods on the rail road. That there had never been a partition fence built between the witness and the plaintiff, on that side of the rail road. That they occupied the pasture together. At the time the witness bought the land, there was a fence along by the rail road track where the horses were kept, in 1852. In the summer of 1852 about 15 rods of it were burned, and it was rebuilt by the defendants, with the aid of the witness. Towards the fall of 1853 it took fire and was burned again. No fence had been there since. The witness saw the fence on fire; there was no fire in the adjoining lot. The locomotive passed and repassed along there continually, every day; and sparks and fire flew from the locomotives. The witness had seen live coals fall from them on to the track. The witness knew the plaintiff's horse, and saw it lying by the track, dead. He saw it the last time, alive, about 1 o'clock, in the pasture. He next saw the horse, some 4 or 5 o'clock on the 8th of December, lying by the track; the horse's hind legs were cut off; one hoof and some blood were on the track; one hoof lay by the track. The witness saw her (the mare) the next morning. She was dead. Some of the road hands buried her. The witness saw engines passing on the road that day. The horse was worth 60 or 65 dollars, more or less. The witness testified that he owned the rest of the pasture not owned by the plaintiff. That no division fence had ever been built across the lot between the witness and the plaintiff, since the fence adjoining the rail road was burned, in 1853. About 15 rods were then burned down clear to the ground. There had been no fence there for a year or more. Where the fence was burned down it was on

the witness' part of the land, and not on the plaintiff's. The plaintiff introduced another witness, who gave some evidence tending to prove that the mare was worth from 60 to 75 dollars; and also tending to show that in 1836 the lot of land on which the pasture was situated was owned by Judge James W. Stevens. The plaintiff here rested, and the defendants moved for a nonsuit, on the grounds, 1. That it appeared that the horse escaped from the premises of E. F. Hollister, and the defendants were not liable to the plaintiff for such escape. 2. That the plaintiff had not shown that the defendants were bound to fence the road. 3. That there was no evidence that the defendants or their agents or servants killed the horse. 4. That there was no negligence or carelessness on the part of the defendants, as alleged in the complaint, shown on the trial. The motion was denied, and the defendants excepted.

The defendants then produced a witness who testified that he knew the pasture lot spoken of; that he had known it 40 years, and been in that neighborhood and near there. That in 1836 James W. Stevens owned the lot—in January, 1836, at the time the old Tonawanda Rail Road Company built the road. The defendants then read in evidence, from the records in the clerk's office of Genesee county, a report made on the 26th day of January, 1836, by three appraisers appointed by the vice chancellor of the 8th circuit to assess the damages which the said James W. Stevens would sustain, as the owner of the pasture lot, by reason of the appropriation of a part of the lot, by the corporation, to the use of the rail road. It appeared from this report that the appraisers assessed the damages of the said Stevens at the sum of $102; it being understood and agreed that he should make and maintain the fences on both sides of the rail road. This record was objected to by the plaintiff, on the grounds, 1. That it did not sufficiently connect the plaintiff with the instrument. 2. That the record only bound Stevens, and did not bind the plaintiff. The record was received by the justice. The defendants also offered in evidence the acts of April 9th and June 2d, 1835, which were

objected to by the plaintiff, but permitted to be read, by the justice.

The defendants then produced a witness who testified that he knew the pasture lot; that on the 8th of December last he was at work near where the horse was killed; that he had been along the track every day; that Hollister and Terry owned the pasture lot; that there was no fence along Hollister's part for some time before the horse was killed; that he saw four horses in there on that day; the horse that was killed was in there; she was driven off the road twice on that day, before she was killed; the witness sent a man to do it; the witness saw the mare lying by the rail road after she was hurt, about half past three; the train that hurt the mare ran no faster than usual; the witness was at that time in the employ of the defendants. There was at that time a fence in front of Terry's land by the rail road. The horses came on the track at the west end of Hollister's part of the pasture. There was another horse killed at the same time. There were three horses on when the witness had them driven off. The witness saw the plaintiff's mare was hurt, about ten minutes after the train passed. The train nearly stopped before the horses were hit. It was the way express train. The mare was on the defendants' land, on the track.

Upon substantially the above proof, the jury found a verdict for the plaintiff, for $65 damages, upon which the justice gave judgment against the defendants for $68.75. On appeal to the county court this judgment was reversed, and the plaintiff appealed to this court.

Wakeman & Bryan, for the appellant.

M. F. Robertson, for the respondent.

By the Court, MULLETT, J. A correct understanding of the subject brought before us by this appeal may require some examination of the common law rules regulating the rights, duties and liabilities of adjoining land owners, in reference to partition

fences. At common law the owner of land was not obliged to fence against the beasts of an adjoining close, but he was at his peril to keep his own cattle on his own premises, and to prevent them from escaping; and if they escaped, they might be taken, on whatever land they might be found, damage feasant; or the owner was liable to an action of trespass, at the suit of the party injured by them. Every unwarrantable entry upon the land of another is a trespass, whether the land be inclosed or not. And a person is equally answerable for the trespass of his cattle as of himself. (12 *John.* 433. 19 *id.* 385. 3 *Wend.* 145, 442. 3 *Hill*, 38, *and cases there referred to.*) When there was no agreement or prescription, there was no mode by which one tenant could compel the tenant of an adjoining close to make division fences; and even when there was such agreement or prescription, the remedy was by action on such agreement or prescription. (*Per Savage, Ch. J. in Holladay* v. *March*, 3 *Wend.* 145.) By the statute entitled "Of division and other fences," (1 *R. S.* 353,) the legislature made provision for enabling each of two or more adjoining owners of lands to compel the other adjoining owners to make and maintain a just proportion of the division fences between them, unless he should choose to let his lands lie open. This law, both the common law and the statute, was held to be applicable to division fences betwen rail road companies and the owners of the adjoining lands. (*In the matter of the Rensselaer and Saratoga Rail Road Co.*, 4 *Paige*, 553.) That part of the defendants' rail road upon which the plaintiff's mare is alleged to have been killed, was laid out and located, and the land taken for its use appropriated, under the act to incorporate the Tonawanda Rail Road Company, passed April 24, 1832. By the 16th and six following sections of that act it was provided that, in case the corporation should not be able to acquire the title to the lands through which the said rail road should be laid, by purchase or voluntary cessions, the directors might present a petition to the vice chancellor of the eighth circuit, praying for the appointment of appraisers to assess the damage which the owners of such lands should severally sustain by reason of the appro-

priation thereof by the corporation to its own use. (*Sec.* 17.) And in assessing such damages, the appraisers were to take into the account the benefit which would accrue to such owners by means of the passage of the said rail road through his lands. (*Sec.* 20.)

It was proved, on the trial of this action, that in January, 1836, when the old Tonawanda Rail Road Company built its road, the land now called the pasture, and a part of which is owned by Ebenezer F. Hollister and a part by the plaintiff, was then owned by James W. Stevens. It appears by the report of the appraisers appointed by Judge Gardner, vice chancellor of the eighth circuit, to assess the damages which James W. Stevens, as the owner of the pasture lot, would sustain by reason of the appropriation of a specified part of the lot, by the corporation, to the use of the said rail road, that such damages were assessed at the sum of $102; and that one of the conditions of the assessment of that sum, mentioned to Judge Stevens at the time, and acquiesced in by him, was, that he should make and maintain the fences on both sides of the rail road. If James W. Stevens had continued to own the pasture lot to the time of the injury complained of, and the mare that was killed had been his, it is clear that he could have recovered no damages, as the injury was occasioned by the defect of fences which he was bound to build and keep in repair.

The Tonawanda Rail Road Company and the Attica and Buffalo Rail Road Company were consolidated and amalgamated into a single corporation, by virtue of the act of April 9, 1850. By the 6th section of that act it is declared that such new corporation shall not be required to fence the land, on either side of the rail road, between Rochester and Buffalo, where either of the two corporations mentioned in the first section of the act, had, by agreement with the owners of the land, or by the award of appraisers, made provision for having such fences built and maintained by the owners of such lands, and have paid such owners according to such agreement or award. And as to such cases, the provisions of the 42d section of the act entitled "An act to authorize the formation of rail road com-

panies, and to regulate the same," passed April 2d, 1850, shall not be deemed applicable to such new corporation.

The damages which James W. Stevens sustained, by reason of the appropriation of his land by the Tonawanda Rail Road Company, were assessed, and reported to the vice chancellor in January, 1836. The company was not entitled to the possession and use of the land, for the purposes of its rail road, except on the payment of such damages, or depositing the amount thereof, for the use of the owners, in the Bank of Rochester. The Tonawanda Rail Road Company, though under a new name, was, up to the year 1853, in the public and undisputed possession of the land, for the uses and purposes for which it was appropriated. This must be prima facie evidence that it had paid the assessment upon which its right to take possession depended; especially as this fact was not denied on the trial. The case, on the trial before the justice, therefore, did not show, or tend to show, that the plaintiff's mare escaped from his pasture, on to the rail road, through the absence or defect of a fence which the defendants, as proprietors of the rail road, were bound to build and keep in repair, but rather that she went on to the rail road through the absence or defect of a fence between the rail road and the lands belonging to Hollister, which James W. Stevens or his grantees were bound to maintain, in which the plaintiff had no interest, and in respect to which the defendants, as the proprietors of the rail road, owed to him no duty.

But the appellant put his right to recover, in the justice's court, against the defendants, principally on the ground that the evidence tended to show that the agents and servants of the defendants, in running their locomotive and cars, on the rail road, burned a part of the fence between the rail road and Hollister's pasture, and that the mare, being rightfully in the pasture, came on to the rail road through the gap in the fence made by such burning. And he claimed that the defendants were bound to repair the fence, and pay all damages which the plaintiff might sustain by the escape of his cattle through the defect in the fence, until it was repaired, whether he was

careless or negligent in taking care of them, or not. Or, in the language of the appellant, it is claimed that "it was the grossest negligence, on the part of the defendants, to run their engines past this unfenced lot, until they had restored it to the condition in which they found it." That the persons along the rail road, from Buffalo to Rochester, whose fences are so burned, are not bound to house their cattle in the summer, or let their farms lie idle. They might use their own farms in the usual manner and charge the company for damages caused by such company through want of the fences thus burned." Waiving, for the present, the consideration of the insufficiency of the plaintiff's evidence to show that he had any interest in the fence destroyed, or any right to complain of its destruction; or to show that the defendants or their servants were guilty of any negligence or fault in burning the fence, or in killing the mare, and conceding to the plaintiff all the facts assumed to have been proved by him, still the legal conclusions claimed by him do not follow. Although the defendants might have been liable to pay the owner the damages for burning the fence, they were under no legal obligation to repair it; nor had the owner a right to neglect or abandon the rest of his property, and charge the defendants for all the damages he might sustain by reason of such neglect or abandonment, until the fence was repaired, any more than the owner of a store filled with valuable goods, which happened to have a door or window destroyed by the carelessness of his neighbor, might neglect and abandon his goods and suffer them to remain in the store in the usual manner, and charge his neighbor for all the goods which might have been taken or lost before he repaired the store. Still the affirmative of the proposition is understood to be, in substance, identical with that insisted upon by the appellant's counsel, on the argument of this appeal.

But a full and fatal answer to the plaintiff's action, in what ever aspect it may be presented, is the carelessness on his part, as proved by himself. It appeared by the testimony of his own witnesses that he suffered his mare to run in a small pasture adjoining the rail road, and between which and the rail

road there had been no fence since the latter part of the summer preceding, until the day she was killed on the rail road, which was the 8th of December. This is the case as made out by the plaintiff, without showing any legal reason or excuse for permitting his mare to run at large, as she did, or to run on the defendants' rail road, and without pretending that the defendants, their agents or servants, intentionally, willfully or knowingly ran their engine against the mare. It is believed that no reported case can be found, giving a plaintiff any encouragement for maintaining an action under such circumstances. The common law rule that an action for negligence cannot be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the damage complained of, is well settled. Although the rule might be supported by a series of English and American decisions, extending from the case of *Blyth* v. *Topham* (*Cro. Jac.* 158) to the present time, yet it is considered sufficient to refer to some of the more recent cases in this state. The case of *The Tonawanda R. R. Co.* v. *Munger*, (5 *Denio*, 255,) was one in which Munger had sued the rail road company to recover for a yoke of oxen which the defendants had run over and killed, while they were straying on the track. Mr. Justice Beardsley, after referring to the above mentioned rule, held that a rail road company was not liable for negligently running an engine upon and killing the cattle of the plaintiff which had come from the highway upon the track of the rail road, though there was no physical obstruction to prevent their entering. This judgment was affirmed in the court of appeals. (4 *Comst.* 349.)

In the case of *Spencer* v. *The Utica and Schenectady R. R. Co.*, which was brought to recover damages of the defendants for an injury sustained by the plaintiff in consequence of the defendants negligently running their train of cars against the plaintiff's wagon, while he was crossing the rail road, it was held that in order to warrant a recovery, it must not only appear that the defendants' agents were guilty of negligence, but that the plaintiff himself was free from negligence or fault. (5 *Barb.* 337.) In the case of *Brand* v. *The Troy and Sche*

nectady R. R. Co. (8 *Barb.* 368,) the plaintiff had brought his action to recover damages for being struck down and run over by the defendants' locomotive and tender while she was walking upon the track of the rail road, upon a side-walk in one of the streets of the city of Schenectady. The plaintiff had recovered judgment at the circuit, from which the defendants appealed to the general term of the supreme court in the 4th district. The judge, at the circuit, had refused, upon the request of the defendents' counsel, to charge the jury that if they believed, from the evidence, that the plaintiff was guilty of negligence and imprudence at the time of the occurrence, and that such negligence and imprudence contributed to the injury complained of, she was not entitled to recover. The defendants' counsel excepted, and this exception presented one of the points made on the appeal. Upon this point the appellate court, after referring to and examining several English and American cases, (Willard, J., delivering the opinion,) came to the conclusion that an action could not be sustained against a rail road company for damages occasioned by a collision between a locomotive and the plaintiff, if the plaintiff's own negligence and imprudence contributed to the injury; and reversed the judgment given at the circuit.

The case of *Clark* v. *The Syracuse and Utica R. R. Co* (11 *Barb.* 112,) was brought in a justice's court, to recover pay for three cows killed by the train of cars on the defendants' rail road, as the plaintiff alleged, through the defendants' negligence. The jury, in the justice's court, gave the plaintiff a verdict for the value of the cows, upon which the justice rendered judgment. The defendants appealed to the county court, where the judgment of the justice was affirmed, and the defendants appealed to the supreme court in the 5th district. That court, (Allen, J., giving the opinion,) among other things, decided that an action for negligence could not be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendants, in producing the damages sustained, and this was so, whether the plaintiff's act was negligent or willful. And that when cows are trespassers upon a rail road, their own

ers could not maintain an action against the rail road company for running over and killing them by their passenger cars, even if the death of the cow was occasioned by the gross negligence of the defendants; and it appearing, in that case, that cows were pastured in a lot adjoining the rail road, between which and the rail road there was no fence, and there being no allegation in the pleadings to authorize evidence that they escaped on to the rail road through a defect of fences which the defendants were bound to repair, and no averment that the defendants were bound to fence at that point, or showing from what place or in what manner, or how, the cattle came upon the road, it was held that no action could be maintained against the rail road company for running over and killing the cows by means of their engine and cars.

In the case of *Haring* v. *The New York and Erie R. R. Co.* (13 *Barb.* 9,) this doctrine, requiring the party who, in an action, claims damages for an injury occasioned by carelessness or negligence of the defendants, to show that the party who received the injury was free from any act which contributed to produce it, was applied to an action brought by a widow, for the loss of her husband, who was killed by the defendants' cars while crossing their rail road. And it clearly appearing, on the trial, that the carelessness of the deceased co-operated with the negligence of the defendants in producing the injury, the supreme court held that the circuit judge did right in nonsuiting the plaintiff.

The same doctrine was again recognized in the case of *Talmadge* v. *The Rensselaer and Saratoga R. R. Co.* (13 *Barb.* 493;) and again, in the case of *Marsh* v. *The New York and Erie R. R. Co.* (14 *Barb.* 364,) although the company had omitted to build fences, as required by the statutes of 1849 and 1850. And the supreme court, in the 8th district (Marvin, J., giving the opinion,) have applied the same principle to the father of a lunatic son, near 30 years old, who, while bringing him home from the insane asylum, on the rail road, carelessly or thoughtlessly left him alone, or unattended, in the cars, at a stopping place, for a few moments, and the son not being able

in the absence of his father to show his ticket, pay his fare, or give any account of himself, and not indicating by any signs his mental derangement, was, before his father found him, put out of the cars, and left to wander on the rail road, and was run over by the next train and killed. The father having taken letters of administration brought an action against the rail road company, under the act of December 13, 1847, to recover compensation of them for causing the death of his son by their wrongful act, neglect or default. His action was defeated, on the ground that it appeared that his own carelessness or negligence, as the temporary guardian of his son, contributed to the injury complained of. (*Willett's Adm'r* v. *The Buffalo and Rochester R. R. Co.* 14 *Barb.* 585.)

From the above decisions, and those cited to support them, we may extract the following propositions as law:

First. That in all actions brought to recover damages for an injury alleged to have been occasioned by the negligence of the defendant, whether the defendant be an individual or a corporation, to entitle the plaintiff to recover, he must show some fault on the part of the defendant; that that fault will not be inferred merely from the injury, unless the defendant is a common carrier of persons and the plaintiff a passenger, as in the the case in 16 *Barb.* 113; upon which hypothesis we are not called upon to give an opinion.

Second. That in such action a plaintiff cannot succeed, if it appears that his own misconduct co-operated with the wrongful act of the defendant, to produce the injury complained of.

Third. That the plaintiff, in such an action, cannot recover, if it appear that the injury complained of was received by him while he was trespassing upon the defendant, without proving that such injury was willful and intentional on the part of the defendant. Either of the above propositions (and they are all applicable to the case under consideration) justified the county court in reversing the judgment of the justice.

The judgment appealed from must therefore be affirmed.

[Niagara General Term, September 15, 1855. *Bowen*, *Mullett* and *Greene* Justices.]

GRIFFIN *vs.* COLVER and others.

22 587
16a 489

In an action for the recovery of the stipulated price for building a steam engine, boilers, &c., the defendants cannot recoup the gains and profits which would have arisen from the use of the engine, &c., had the same been delivered at the time agreed, and which gains and profits the defendants have been prevented from receiving, by the failure of the plaintiff to perform his contract within the time.

In such a case the defendants are entitled to recoup the loss of the value of the use of their machinery, &c., but not the profits of running it, in their ordinary business.

The gains and profits recoverable are those only which are the direct and immediate fruits of the contract, expressly stipulated for, or contemplated, by the parties.

APPEAL, by the defendants, from a judgment entered upon the report of a referee. The action was brought to recover the value of a steam engine, boilers, &c. sold and delivered by the plaintiff to the defendants, in pursuance of a written agreement between the parties. The complaint averred the full performance of the agreement, by the plaintiff, and the delivery to the defendants of the engine, &c. within the stipulated time, and the failure of the defendants to pay for the same. The answer set up various defenses; among which was this: that the engine and machinery were not completed, nor ready for delivery, within the time agreed; whereby the defendants, for the space of one month and a half, lost the use of the boilers, engine and machinery mentioned in the agreement, and also lost the use of their two planing machines, five saws and other machinery in their mill and lumber yard in Oswego, which said planing machines, saws and other machinery said engine was intended to drive, and of which the plaintiff had notice, at the time of making the agreement.

The cause was tried before a referee, who found the following facts: That in the spring of 1851, the plaintiff sold and delivered, and set running, to and for the defendants, a steam engine, boilers and other machinery, for the price of $3000, as alleged in the first cause of action in the plaintiff's complaint, and that the defendants were indebted to him therefor, except as thereinafter stated. That the defendants paid the plaintiff in notes,

money, goods, &c., and in money paid for plaintiff, in all the sum of $2081.27. That the plaintiff failed to deliver the said engine, boilers and other machinery, all by the first day of March, 1852, by reason of which the defendants sustained damages to the amount of $66.12. And he found, as a matter of law, that the defendants were entitled to be allowed to them in this cause the two sums last above mentioned, amounting to the sum of $2147.39. And that the defendants were indebted to the plaintiff for such engine, boilers and machinery, over and above all discounts, set-offs, recoupments and counter-claims, in a balance (including interest) of $918.65; for which sum, with costs, judgment was entered.

The principal question discussed on the hearing before the referee was, what was the correct rule of damages for not delivering the engine within the time specified in the contract. Several witnesses on the part of the defendants testified that the net average value of the use of the machine, at the place where it was located for the purpose for which it was intended, and had been used in connection with the machinery it then drove, was $50 per day, above the wear and tear and the expense of running it, so that in sixty days the use would pay the price which the defendants were to give for the machine, $3000. Upon cross-examination, these witnesses were inquired of how they made their estimation. They stated the quantity of lumber the machines driven by this engine would plane and cut per day, the price the defendants charged for planing, and deducted the expense of running and the wear and tear. The referee held that this was clearly an estimate of the *profits*, and nothing else, which was inadmissible as a rule of damages, in such cases.

Talcott & Churchill, for the appellants.

A. & D. Coats, for the respondent.

By the Court, HUBBARD, J. I think, upon well settled authority, the defendants are not entitled to recoup the loss of the gains and profits which they anticipated to realize, by the

use of their machinery. They were, doubtless, upon the finding of the referee and the principle of his decision, entitled to recoup the loss of the value of the use of their machinery, &c., but not the profits of running it in their ordinary business.

It is perhaps difficult to state the precise measure of damages to which they were entitled, growing out of the breach of the plaintiff's covenant. The referee allowed interest on the value of the defendants' investment in machinery, &c. while it remained unoccupied. This may not give a full indemnity in this respect, nor perhaps could ample compensation be made, short of going into speculative profits in the general business of the defendants, which the law will not allow, because of its great uncertainty, depending upon so many contingencies, and the success, it may be, of entirely collateral enterprises.

In a case like this, ordinarily, interest, together with damages for the delay of workmen, incidental expenses, &c. would present as safe and remunerative a rule, as could well be adopted. Another criterion might be adopted, which I think would be equally safe and entirely just. It is, in respect to the defendants' mill, machinery, &c., to allow the value of the rent or use and occupation for the time, unoccupied. But no evidence was given by which to determine the value of the rent, and hence the referee could not adopt that measure of damages. The rule which he did adopt was, however, sound, and the only one which could have been adopted upon the evidence.

The general rule of damages applicable to executory contracts, for breaches, is well stated in the case of *Freeman* v. *Clute*, (3 *Barb.* 424.) "It is a general rule that the party complaining of a breach of an executory contract is entitled to indemnity for the loss which the non-performance of the obligation by the other party has occasioned, and of the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract." In that case the defendant agreed to make and prepare for the plaintiff a steam engine of ten horse-power, with a suitable boiler. There was a delay of three months, beyond the time stipulated, in putting them up. They were found to be

defective, and further delay was occasioned. The learned justice, in deciding the case, says: "I cannot agree with the counsel for the plaintiff that the estimated profits upon the manufacture of a specific quantity of flax seed into linseed oil, constitutes a legitimate item of damages against the defendants. Such profits are entirely too speculative and uncertain to make them a measure of damages." That case in its facts is quite analogous to the one at bar. The engine was intended to propel the plaintiff's machinery in his oil mill. Damages were allowed for the use of the mill and machinery, fuel consumed delay of workmen, and interest on the amount expended in pur chasing stock for the mill. Upon what principle the value of the use of the mill and machinery was ascertained does not appear, but probably it was estimated by computing interest on the investment, by way of rent. The case, however, decides this point, that the anticipated gains and profits from the use of the engine in the plaintiff's oil mill in his general business were not allowable. The measure of damages for the breach of an executory contract, which Pothier states as the rule of the civil law, has been adopted, and may be regarded as the settled law of this state. He says: "In general the parties are deemed to have contemplated only the damages, and interest, which the creditor might suffer from the non-performance of the obligation in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby, in respect to his other affairs; the debtor is therefore not answerable for them, but only for such as are suffered with respect to the thing which is the obligation." (1 *Evans' Poth.* 91.) This rule is cited with approbation in *Masterton* v. *The Mayor &c. of Brooklyn*, (7 *Hill*, 61.) The gains and profits recoverable are those only which are the direct and immediate fruits of the contract, expressly stipulated for, or contemplated by the parties. The contract in *Masterton* v. *The Mayor &c.*, was for the delivery of marble hewn in a certain manner, so as to be fitted for use in building. The defendants refused to receive all the marble stipulated for, and the action was brought to recover damages upon the contract, for a breach of covenant. The

plaintiff was allowed to recover the profits which he would have made had he been permitted to fulfill his contract. This was in analogy to that class of cases where a party is allowed to recover the profits of a good bargain in the purchase of a chattel which the other party refuses to deliver. He is allowed to recover the market value over and above the agreed price, as the legitimate fruit of his contract.

The case of *Blanchard* v. *Ely*, (21 *Wend.* 342,) it seems to me, is decisive of the case at bar. The head note, which is sustained by the case, is as follows: "In an action for the recovery of the stipulated price for the building of a steamboat, the plaintiff is entitled to recover the full amount, without any deduction by way of recoupment of damages to the defendant in consequence of loss sustained by him for the loss of trips, and the profits resulting therefrom, occasioned by defects in the boat or its machinery. The defendant in such case is, however, entitled to an allowance for moneys necessarily expended by him in supplying defects in the vessel or its machinery, &c. The courts of common law seem inclined to adopt the rule of the civil law in respect to damages for breach of contract relating to personal property, which is, that the party entitled to claim performance may claim damages for the non-performance in respect to the particular thing, the object of the contract; but not such as may have been accidentally occasioned thereby in respect to his other affairs, &c."

In the case at bar, the use of the defendant's machinery, &c. may, upon the question of damages, be regarded as the object of the contract and within the legal contemplation of the parties, but certainly not the gains and profits of the general business of the defendants connected with that machinery. Such profits are no more allowable than the loss of trips and the profits therefrom, of the running of the steamboat, in *Blanchard* v. *Ely*.

The case of *Davis* v. *Talcott*, (14 *Barb.* 611,) seems to sustain the defendants in claiming the damages which they sought to recoup on the trial. That case was similar to this in its

facts. The action was to recover damages for the defective execution of a contract to construct and put up machinery in a flouring mill. It was held that the plaintiff was entitled to recover, as one item of damage, "such sum as the mill would have earned during the time it was necessarily delayed in consequence of the breaking or defect in the machinery; taking the ordinary earnings of the mill, after deducting from the gross earnings the expenses of running the same, as the net profits.' This decision was made by a divided court, one member dissenting, and having examined the authorities cited, I think they do not warrant the decision made. I have already referred to most of them. The case of *Dewint* v. *Wiltse*, (9 *Wendell*, 325,) cited as authority, establishes a liberal rule of damages. It is to be observed that the opinion of the court is not published; the reporter's note is simply given, with a brief statement of facts. The grounds of the decision are not stated. It may be that the loss of the rent of the tavern, store, &c. was a subject of damage expressly stipulated for in the contract of the parties, or it may have been recovered on the ground suggested by Justice Cowen in *Blanchard* v. *Ely*, (*supra.*) He says: "The case of *Dewint* v. *Wiltse* must, I think, have been regarded by this court as a *fraudulent breach* of a covenant to keep a ferry in repair, which materially benefited the plaintiff's tavern." It may be questionable whether even a fraudulent breach could enhance the damages beyond those which are the subject of the contract itself and directly arising from it. However that may be, or whatever may have been the ground of the decision in *Dewint* v. *Wiltse*, I think it should not be held authority to allow the recovery of damages beyond those connected with the particular thing which is the object of the contract. I cannot therefore concur in the decision of *Davis* v. *Talcott.*

It follows that the defendants were not entitled to recoup the loss of their anticipated profits in running their planing mills and machinery. These profits are not immediately and necessarily connected with the object of the contract. They are but the result or consequence of the derangement and cessation of

the defendants' general business; too speculative, uncertain and remote to be the subject of legal damage.

The judgment and report of the referee must therefore be affirmed.

[Oneida General Term, January 1, 1855. *Hubbard, Pratt* and *Bacon*, Justices.]

Waters *vs.* Whittemore.

22 593
27h 600

An action brought in a justice's court, against an attorney, to recover back money which it is claimed that he has taken from the plaintiff by charging illegal fees in bills of costs collected of him, is not to be regarded as an action of assumpsit based upon an implied promise.

It therefore is not an action for money due upon a contract, express or implied, within the meaning of the first section of the act of April 26, 1831, and consequently the provision of the act abolishing imprisonment for debt arising upon contract does not apply to the case, and a justice of the peace has no jurisdiction to issue a short summons, against a defendant residing out of the county.

But if such an action were to be regarded as based upon an implied promise, it is exempted from the operation of the provisions of the act of April 26, 1831, allowing a short summons, by the 2d and 30th sections of that act, on the ground that an attorney is a *public officer*, and that it is official misconduct in him to charge and receive more fees for any service than the statute allows.

A short summons cannot be issued, in any case, against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract, express or implied.

THIS action was commenced before a justice of Chenango county, against the defendant, who was a resident of Madison county, to recover back the sum of about forty dollars which it was claimed that the defendant, who was an attorney, had taken from the plaintiff, by charging illegal fees in certain bills of costs which he had collected of the plaintiff. The gravamen of the complaint was in tort. The defendant, on the return day of the summons, raised the objection to the process

that a short summons could not issue in such a case, and asked to have the suit dismissed for that cause. This was refused, and the plaintiff recovered a judgment for the amount claimed in the justice's court, which was affirmed, on appeal, by the county court. From the judgment of the county court the defendant appealed to this court.

B. F. Rexford, for the plaintiff.

J. P. Whittemore, defendant in person.

MASON, J. The 5th section of title 4, of art. 3d, of part 3d, of ch. 10th of the revised statutes, prohibits an attorney from receiving any other or greater fee or reward for any service than shall be allowed by law; and the 7th section of the same title makes the receiving of such fees a misdemeanor, and subjects the person guilty thereof to treble damages. (2 *R. S.* 651, § 7.)

I am of opinion, after a careful examination of the pleadings in this case, that this is not to be regarded as an action of assumpsit based upon an implied promise; and if so, then certainly it is not an action for money due upon a contract, express or implied, within the meaning of the first section of the act of April 26, 1831, and consequently the provision of the act abolishing imprisonment for debt arising upon contract does not apply to the case, and therefore the justice had no jurisdiction to issue a short summons. But if we hold it to be an action based upon an implied promise, then I am of opinion that the case is excepted from the provisions of the act of April 26, 1831, allowing a short summons. Sections 2 and 30 of that act seem very clearly to except this case. The 2d section excepts from the provisions of the act, non-residents of the state, &c., and also actions for fines or penalties, or on promises to marry, or for moneys collected by any public officer, or for any neglect or misconduct in officers or in any professional employment; and the 30th section provides that no execution against the body shall be issued by any justice of the peace,

upon a judgment rendered by him, for the recovering of money collected by a public officer, or for official misconduct or neglect of duty, or damages for misconduct or neglect in any professional employment. (*Laws of* 1831, *p.* 403, § 30.) And the 31st section prohibits any warrant from being issued in any case where, by the provisions of the 30th section, an execution cannot go against the body. Then comes § 33, under which the summons in this case was issued, which reads as follows: "Whenever by the provisions of the 30th section no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof," &c. (*Laws of* 1831, *p*, 403, § 33.) It will be seen, therefore, that the short summons cannot be issued in any case where a warrant could go under the 30th section of the act. Now it should be borne in mind that attorneys and solicitors are public officers. Lord Hardwicke said in the case of *Walmsley* v. *Booth*, (*Barn. Ch. R.* 478,) that attorneys and solicitors are to be considered as public officers; and the same is said by Chancellor Walworth in the case of *Merritt* v. *Lambert*, (10 *Paige*, 356.) The same was held in the court of dernier resort in this state in the case of *Wallis* v. *Loubat*, (2 *Denio*, 607.) Now it is misconduct in an attorney to charge and receive more fees for any service rendered than the statute allows; especially when the statute makes such act an indictable offense, as we have seen it does, and the attorney must be regarded as receiving his fees officially, as much so as a sheriff or any other officer. And if so, then the act of an attorney, in receiving illegal fees, is one of official misconduct; and I apprehend that it is because attorneys and solicitors are regarded as officers of the court, that our courts have been in the habit of granting relief against them by summary motion, treating the act as one of official misconduct in an officer of the court, and therefore to be redressed in a summary manner.

But again, it should be borne in mind that prior to the act of April 26, 1831, the summons could never go against a non-resident of the county. It was expressly provided by the 13th

section, (2 *R. S.* 227,) that no person shall be proceeded against by summons out of the county in which he resides, and by the 17th section of the same act the warrant is given. This statute remains in full force except as the same may be affected by the 30th, 31st and 33d sections of the non-imprisonment act above referred to, and these provisions only apply to demands arising on contract, express or implied. The short summons, therefore, cannot go in any case against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract, express or implied, and not when it arises on contract in the class of cases above stated. And if I am right in the construction which I have put upon this complaint, that it does not purport to be upon a demand arising on contract, then the short summons could not go in this case against the defendant, were he not an attorney of the court. It follows, therefore, that the defendant's second objection before the justice was well taken, and the judgment of the county court and that of the justice must be reversed.

GRAY, J., and SHANKLAND, J., concurred.

CRIPPEN, J., voted for reversal, on the grounds and for the reasons stated in his opinion as reported in 13 *Barb.* 634.

Judgment reversed.

[TOMPKINS GENERAL TERM, September 11, 1855. *Crippen, Gray, Shankland* and *Mason*, Justices.]

22 597
22 606
38 522

HUBBARD and another *vs.* EAMES, Receiver of the Ætna Insurance Company, of Utica, and the Ætna Insurance Company.

Where individuals claiming that an insurance company was organized and only authorized to do business as a mutual insurance company, and upon the plan of mutual insurance, and that policies issued to certain persons in consideration of a premium paid in cash, and upon the principle of insurance for cash premiums, were unauthorized and void as contracts of the company, brought an action, as the makers of a premium note held by the receiver of the company, to restrain him from assessing, or collecting of them, any amount for the payment of losses upon policies effected in consideration of a cash premium, or from applying any of the assets of the company to the payment of such losses, and for an accounting by the receiver; *Held*, that the creditors of the company had an interest in the controversy, adverse to the plaintiffs, and were necessary parties defendants.

In such an action is brought against the insurance company, and its receiver, only, and judgment is rendered therein, according to the prayer of the complaint, creditors of the company upon policies of insurance effected upon the principle of insurance for cash premiums may apply by motion, while the proceedings are open, and before any final judgment has been given, to vacate and set aside the judgment in such action, so far as it affects or passes upon the rights of the claimants under the cash policies, or gives direction to the funds or property in the hands of the receiver, to their prejudice, or without making provision for the payment of such claims.

MOTION by Henry W. Rathbone and other creditors of the Ætna Insurance Company, to set aside a judgment restraining the receiver of said company from collecting assessments made by him on the notes of the company, to pay the losses of said creditors in the cash department of said company. The grounds of the motion appear in the opinion.

Henry R. Mygatt, for the motion, made the following points. I The creditors of the company have an interest in the controversy adverse to the plaintiffs, and are necessary parties to a complete determination of the questions involved therein. They should be defendants. (*Code*, § 118.) Section 118 of the code was borrowed from the chancery practice, and was intended to preserve the right and duty of a plaintiff, to make parties all persons directly interested in the question or controversy stated

in the complaint. (*Mitchell, J., Voorhies* v. *Baxter*, 1 *Abbott's Pr. R.* 45.) Where the receiver of the property of a judgment debtor, appointed by the court on a creditor's bill, commences a suit against the trustee of a judgment debtor to reach the equitable interest of the latter in a fund held in trust for him, the judgment debtor is a necessary party to the suit. (*Vanderpoel* v. *Van Valkenburgh*, 2 *Selden*, 190.) The equity rule is universal, "that the defendants should consist of all persons interested in the relief sought, who are not already joined as plaintiffs." (*Adams' Equity*, 3*d Am. ed.* 312.) Adams on Equity further says: "The interests which require such joinder seem generally referable to one of the three following heads: First, interests in the subject matter which the decree may affect, and for the protection of which the owners are joined." (*Adams' Equity*, 314.) At page 315 (marginal page) of Adams: "If the object proposed is not confined to any particular interest, but affects the corpus of the estate, all such persons ought to be parties." (*Brookes* v. *Burt*, 1 *Beavan*, 106.) As the rights of the body of creditors are affected, and that without a hearing, the objection was taken in time. It is sufficient that a party make his objection when he first acquires knowledge that his rights are about to be impaired. Most of the creditors are non-residents, residing in Rhode Island, Ohio, Missouri, Pennsylvania and Michigan. In case of the omission of indispensable parties, or where the rights of absent parties would be affected, the objection may be taken on hearing by the court itself, or for the first time on appeal. (*McMahon* v. *McMahon*, 18 *Alabama R.* 576.)

II. "When a complete determination cannot be had without the presence of other parties, the court must cause them to be brought in." (*Code*, § 122. *Davis & Palmer* v. *The Mayor &c. of New York*, 2 *Duer*, 663.) Story says: "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it; and also, that future litigation may be prevented

Hence the common expression, 'that courts of equity delight to do justice, and not by halves.' And hence, also, it is a general rule in equity, (subject to certain exceptions which will hereafter be noticed,) that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all." (*Story's Eq. Pl. 5th ed.* § 72.) In this case a perfect list of all the creditors is with the receiver, with their residences, and they can be joined without delay or inconvenience. Under the former practice, the creditors would be driven to a cross bill or a bill to impeach the decree, but the code avoids multiplicity of suits. In this case the receiver's personal interest is in favor of this judgment, as he is a large premium note debtor of the company. The premium notes are liable for the losses in the cash department. (21 *Barb.* 610.) Upon the ordinary principles upon which justice is administered in courts of equity, these creditors cannot be deprived of their property without notice of the suit and an opportunity of making a defense. Justice Story remarks, that if the absent parties have rights wholly distinct from those of the other parties, the court cannot properly proceed to the determination of the suit without their being made parties. (*Story's Eq.* 81, *and cases. Gray* v. *Schenck*, 4 *Comst.* 462.) In cases of trusts, Story says: "The general rule in cases of this sort is, that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust*, (or beneficiaries,) as well as the trustees, are necessary parties. The *cestuis que trust* have the equitable and ultimate interest to be affected by the decree, and therefore are necessary parties." (*Story's Eq. Pl.* § 207, *and cases.*

Philo Gridley, for the plaintiffs.

W. F. Allen, J. The Ætna Insurance Company was incorporated under the general laws of the state, authorizing the incorporation of companies for the business of insurance; and in proceedings by action in this court for the dissolution of the

company, commenced by an officer and creditor, the defendant Eames was appointed receiver of its property and effects, under the statute. The present applicants claim to be creditors of the company upon policies of insurance effected upon, and in consideration of, a premium paid in cash and upon the principle of insurance for cash premiums.

The plaintiffs claim that the company was organized and only authorized to do business as a mutual insurance company, and upon the plan of mutual insurance, and that the policies issued to the parties now seeking to be heard, were unauthorized and void as contracts of the company; and this action was brought by them as the makers of a premium note for a large amount, held by the receiver, to restrain the receiver from assessing, or collecting of them, any amount for the payment of losses upon policies effected in consideration of a cash premium, or from applying any of the assets of the company to the payment of such losses, and for an accounting by the receiver.

The receiver and the company, only, are made defendants. The cause was brought to trial at the last October circuit, in Oneida county, and a decision made and a judgment ordered, in deference to a former decision of this court upon the principal question supposed to be involved, in substantial conformity to the prayer of the complaint, and adjudging in substance, amongst other things, that the holders of the cash policies, occupying the position of the claimants, were not entitled to share in the assets of the mutual insurance; and that the premium notes of the company, held by the receiver, were not properly applicable to the payment of losses under policies of that character. An accounting by the receiver was ordered, and further directions were reserved until the coming in of the account.

The decision and judgment pronounced were interlocutory, and no final judgment has, so far as appears, been given in the case. The proceedings are still open and subject to the control of the court, upon the application of any party having an interest, and who is in a situation or has a right to be heard. (*Code*, § 245. *Chittenden* v. *Miss. Society*, 8 *Howard's Pr. R.* 327.) There has been no laches on the part of those now seek

ing relief; and it does not appear that final judgment has passed in the action, so that there is no technical difficulty in the way of granting the relief asked, if indeed the applicants are proper parties necessary to a correct decision of the matter involved in the action. If they should have been brought into the action as parties at its commencement, and if an objection for want of parties would then have been tenable, they should now be permitted to come in and be made parties by a proper amendment of the complaint. The rule as to parties in actions under the code, in the nature of suits in equity, and which under the former system would have taken the form of suits in chancery, is the same, substantially, under the code as it was before; and a suit which would have been defective in chancery for want of proper parties, would be defective now, as a civil action under the code. It will not be necessary to refer more particularly to the provisions of the code upon this subject. The sections relating to it are 117, 118, 119 and 122. Aside from those cases in which for peculiar reasons one or more of several parties, occupying in all respects the same position, and claiming the same rights, may sue or defend for the benefit of the whole, every individual who is interested in the subject matter of the action, and in the questions involved therein, and whose interests may be affected by the judgment or decision, is a necessary party either in his own name and person or by his legal representative. He is a necessary party to a complete determination or settlement of the questions involved in the action, (*Code*, § 118,) and must be brought in before a judgment can be pronounced. (*Code*, § 122. *Davis* v. *Mayor &c. of New York*, 2 *Duer*, 663.)

The doctrine of representation applies to those cases in which it is inconvenient or impracticable, by reason of the great number of parties in interest, to bring them all in as parties to a suit for or against them, and to those where the court can see that they are substantially represented, and their interests actually cared for and protected by others in the same interest, actually prosecuting or defending for the benefit of all. But, in cases of this character, every party whose rights are to be affected by the decree must be actually a party, or substan-

tially represented, and when substantially represented, his absence is excused; and yet, in that case, he may obtain leave to go in before the master. He is *quasi* a party; his cause is in the course of decision, and he may at any time take an active part. (*Calvert on Parties*, 58.)

It is not claimed that this case comes within the exception to the genenal rule, requiring all parties having an interest in the question to be made parties to a suit in which their interests are to be passed upon.

In another class of cases the doctrine of representation is applied where a person is made a party in a representative character which he takes under the law, and in that character represents certain interests, which the public or a class of individuals have in common. Public officers, in this way, represent and protect the interests of the entire community, but they do not represent one or more individuals of that community, whose interests are peculiar to themselves, and distinguished from those of the public at large, and who are to be affected by the judgment or decree in their individual interests.

Executors and administrators represent legatees, next of kin, and creditors in suits affecting the personal estate of their testators or intestate, but they do not represent any particular individuals of either class in a controversy with the estate, or in contests between themselves and the other parties claiming to be entitled to share in the estate. The same may be said of assignees of bankrupts and insolvents, receivers of insolvent individuals or corporations, and trustees of express trusts. And the same principle is applied to corporations, who sue and are sued by their officers, and every member is represented in respect to his corporate rights. In suits which affect the members only in respect to their rights, the corporation by name, or those officers who may by law sue and be sued by whom the corporation is by law represented, ought to be made parties. If, however, the suit affects any individual member, not merely in the character which he holds in common with every other member of the corporation, but also in his individual character, he should be made a party. (*Calvert on Parties*, 23. *See also*

same book, p. 171, § 10, *and cases; Adams' Eq.* 315; *Court* v. *Jeffrey*, 1 *Sim. & Stu.* 105; *Waite* v. *Temple, id.* 319; *Brookes* v. *Burt*, 1 *Beavan*, 106.) A receiver of an insolvent corporation represents the creditors and stockholders, and all others in the same interest, in the assertion or defense of any claim or right in their behalf or for their benefit, and they will be bound by the judgment or decree in an action brought by or against him, in respect to such claims or rights. (*Gillet* v. *Moody*, 3 *Comst.* 479.) So a receiver of the property of a judgment debtor represents the judgment debtor, as well as the creditor, in an action for the recovery of a debt or property due to or belonging to the judgment debtor, with a view to subject it to the payment of the judgment, and neither the debtor or creditor in the judgment are necessary parties to the action; but if interests of the debtor are involved, other than those which he has in common with his creditor, he becomes a necessary party to any action in which they may be affected. (*Vanderpoel* v. *Van Valkenburgh*, 2 *Selden*, 190.)

The relief demanded, furnishes a very proper and the most usual test by which to determine the necessity of making a particular individual a party to an action; and if reference is had either to the frame of the complaint or the demand for relief in this action, it will be evident that the individual interests of those now asking to come in, as distinguished from their interest in common with all other creditors and persons interested in the assets of the corporation, are directly involved. The claim to the relief sought, so far as it relates to the individual liabilities of the plaintiffs upon their premium note, is based not upon any thing affecting the validity of these obligations in resisting which, or in asserting its validity by an action brought to enforce it, the receiver could doubtless represent all the parties interested in upholding its validity, whether as creditors or otherwise; but he would not represent the plaintiffs in respect to this particular claim. Neither is the plaintiffs' claim made to rest upon any point or principle common to all having claims upon the company, and in the decision of which, all interested in the assets have the same interest. On the contrary, the entire basis of the

particular relief sought by the plaintiffs, is the invalidity of the claims of one class of creditors, or of those claiming to be creditors of the company, upon one class of contracts, and the effect of the judgment demanded will be to exclude them from all right to participate in the larger part, if not in all, of the assets of the company.

Now the receiver never was appointed to represent them in any such contest or controversy. He is their representative merely to collect premiums and apply the property and effects of the company; and in all litigations and controversies he represents only those claiming in common an interest in the assets, and not those who claim adversely to him and in hostility to the interests of those interested in the assets of the company. He was not called upon to assert their individual rights as creditors of the company. He might have been called upon to resist their claims, but his interest and duty as the receiver of an insolvent corporation, acting for the benefit of creditors, was and is to reduce the amount of the claims upon the fund to the smallest amount consistent with the legal rights of the parties. Thus it was and is his duty, with a view to protect those whom he represents, to scrutinize every claim presented, and resist the payment of every demand that he supposes to be illegal or unfounded.

Without imputing any blame to the receiver, it may be safely said that there is no reason to presume that the claimants under the cash policies were as well defended, or their interests as well cared for and protected, as they would have been had they been made parties to the action, and had an opportunity of presenting their own claims in their own way. (*Cockburn* v. *Thompson*, 16 *Vesey*, 321.) The very gist of this action was to set aside the claims of the present applicants and those having similar claims; and until it can be shown that the receiver, in any legal sense, represents them as a single class of claimants upon the fund in his hands, as against all others having claims upon the same fund, or otherwise interested to reduce the amount of the demands upon it, it cannot be said that they have been represented in the action. As between the plaintiffs

and others in the same interest, and the claimants under the cash policies, as individuals having and making conflicting claims in respect to a common fund or at least the same fund, of which Eames was the receiver for the benefit of all who should have an interest in it, he was a mere middle man, having no right to represent either. If he could represent either as the receiver of the whole fund, he could represent both, and the question might as well have been decided upon his *ex parte* application, or in an action or proceeding in which he should be both plaintiff and defendant. The plaintiffs would have thought it very hard, had the question been decided against them upon the application of those now claiming to be heard, and without calling upon them to show cause, in a manner to estop them, when they should be called upon to pay their premium notes. The judgment in such a case would have been a nullity, as is the one already pronounced, so far as it pronounces upon the claims of individual creditors not parties to the action, or seeks to give direction to the fund in the hands of the receiver, to their prejudice; and as it may work a wrong and do mischief by being permitted to stand, it must be vacated. The only judgment or order which should have been granted, was an order of reference to a competent lawyer to take proof and report to the court the amount and character of the funds and available resources in the hands of the receiver, and the amounts of the several claims thereon, and the rights and interests of the several claimants, with directions to the referee to cause all the parties in interest, and the several claimants, to be properly summoned to appear before him for the protection of their several interests. Perhaps an order of that character would have been proper and regular, and upon the proceedings, and report of the referee, a judgment which should be of binding force upon all could have been pronounced; but as this was not argued, I will not pass upon it, but leave the parties to stipulate, if they are so advised, that such order may be entered in place of the interlocutory judgment already given. If such stipulation is not made, the judgment must be set aside, so far as it affects or purports to affect or pass upon the rights of the claimants

under the cash policies, or to give direction to the funds or property in the hands of the receiver to their prejudice, or without making provision for the payment of such claims. And all proceedings must be stayed in the action, until by proper amendment the claimants are made parties to the action.

[ONONDAGA SPECIAL TERM, June 9, 1856. *W. F. Allen*, Justice. Affirmed at the ONONDAGA GENERAL TERM, October 10, 1856. *Pratt*, *Bacon* and *W. F Allen*, Justices.]

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ABEL HART *vs.* ABEL HART, Jun.

A lease of agricultural lands for twelve years, with a covenant of renewal for twelve years longer if the lessor shall live, and a further covenant to continue the renewals every twelve years so long as the lessor shall live, is good for the first twelve years, but the covenants for renewal are void as being in contravention of section 14 of article 1 of the constitution.

The covenant for renewal, being an independent covenant, may fall without impairing the grant for the first twelve years.

Where a son agreed to support and maintain his father during his life, and covenanted that if, at any time, the father *should become dissatisfied* with living with him, the son would pay all reasonable charges for the board and necessary expenses of the father; *Held* that the father had a right to quit the family of the son whenever he became dissatisfied, without showing any good excuse for leaving; and that it was for him to judge whether there was good cause for dissatisfaction.

A lease from father to son, of real estate, for a term of years, with a covenant on the part of the lessee to support the lessor, during his life, is no evidence of a settlement of accounts between the parties, so as to bar a set-off by the son, in an action by the father, upon the covenants in the lease.

THIS action was brought to recover damages for a breach of a covenant, whereby the defendant was to maintain the plaintiff through life, &c. The following is a copy of the instrument upon which the action was brought:

"This indenture, made the 9th day of March, 1849, between Abel Hart of the town of Candor and the county of Tioga, N. Y., of the first part, and Abel Hart, jr. of the same place of the

second part, witnesseth, that the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned and contained, to be paid, kept and performed on the part and behalf of said party of the second part, hath leased, demised and to farm let unto the said party of the second part, and his representatives, for and during the term of twelve years, if said party of the first part should so long live, and if not, then during the life of the said party of the first part, all the home farm of the party of the first part with the appurtenances, and also all the personal property of all kinds, except, &c., reserving therefrom two beds and bedding, &c. And the said party of the first part hereby covenants and agrees, to and with the said party of the second part, his heirs and assigns and executors and administrators, that at the termination of the said term of twelve years, if he should live so long, he will renew this lease upon the terms and conditions therein contained, for the further term of twelve years if he should so long live, and if not, then for the term of his natural life, and continue to renew the same from time to time at the end of each twelve years or as long as he shall live; and it is further covenanted and agreed between the said parties, that the balance of the hay now on hand, if any, after keeping the stock through till feeding of grass, and the teams till getting through the spring work, is to be appraised by disinterested men and to be paid by the said party of the second part and sold by him, and the avails paid to the party of the first part. And the said party of the first part hereby covenants and agrees that upon his decease all his personal property of whatsoever name or nature, as well that which is above excepted out of this lease or instrument as that which is not, except the two beds and bedsteads, bedding and bed curtains, and excepting also his money, notes, book accounts and demands, shall be the absolute property of the said party of the second part. In consideration whereof the said party of the second part hereby covenants and agrees, to and with said party of the first part and his representatives, to pay Abel H. Potter the sum of one hundred dollars on his arriving at the age of twenty-one years, and to pay to the party of the first part

the yearly rent of one hundred and fifty dollars from the date hereof at the end of each year during the continuance of this lease, and to pay all taxes assessed upon said property during said time, and also to maintain the said party of the first part through life, and to find and provide him with good and respectable clothing and proper and reasonable board and lodging, looking after and providing for all his wants in sickness and in health; to procure and pay for all necessary and proper medical aid and attendance for him, and to pay all his funeral charges, and to procure and erect suitable grave stones at his grave; and if at any time said party of the first part shall become dissatisfied with living with said party of the second part, then the said party of the second part is to pay all reasonable charges for the board and necessary expenses of the said party of the first part; and if said party of the first part should not live the present year out, the party of the second part is nevertheless to pay to his representatives one full year's rent of one hundred and fifty dollars; but in other respects said rent to cease on the death of said party of the first part. And it is the express agreement of the parties to these presents, that if the yearly rent above reserved, or any part thereof, shall not be paid as above agreed, upon demand thereof, or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, his heirs, executors, administrators or assigns, to be paid, kept and performed, then and from thenceforth it shall and may be lawful for the said party of the first part to re-enter into and take possession of the demised premises and every part thereof, and to take possession of said personal property, and to hold the same free and discharged from the lease and agreement. In witness whereof," &c.

The answer, after denying the allegations of the complaint, set up a counter-claim, averring that the plaintiff was indebted to the defendant for work and labor and for personal property sold and delivered, and for money had and received, &c. and demanded judgment for the sum of $1800. The cause was tried before referees. The evidence showed that the plaintiff had left the family of the defendant, and the defendant claimed it was

without any just cause, and that consequently the plaintiff could not recover. The defendant also claimed that the lease was invalid. The defendant offered to prove his counter-claim. This evidence was excluded, on the ground that the execution of the lease, by the parties, was evidence of the settlement of all accounts up to that date, and the account was all anterior to that time. The referees found the sum of $873.28 due to the plaintiff, and judgment being entered for that amount, at a special term, the defendant appealed.

Davis & Warner, for the appellant.

Geo. S. Camp, for the respondent.

By the Court, MASON, J. I am strongly inclined to think that this lease cannot be upheld for a longer period than twelve years, for the reason that it is against the spirit and policy of section 14 of article 1 of the constitution, which declares that "no lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." The lease in the case at bar is for twelve years, with a covenant of renewal for twelve years longer if the lessor should live, with a further covenant to continue the renewals every twelve years so long as the lessor shall live. Leases of this kind, with a covenant of renewal, have not been treated by the courts as precarious interests. They are enforced, and a court of equity will compel a renewal. (9 *Ves.* 325. 16 *id.* 84. 14 *id.* 332. 2 *id.* 443, *n.* 4. 5 *Bac. Abr.* 677, *Bouv. ed.*) Leases of this kind are become a fund for settlements of every kind, for mortgages of every kind, for the whole term to which the renewal might extend. (5 *Bac. Abr.* 677, *Bouv. ed.*) These covenants to renew run with the land, and bind the grantee of the reversion. (4 *Kent's Com.* 109, 3*d ed.*) The lease, however, is good for the first twelve years; but the covenant of renewal is, in my judgment, in contravention of the constitution. The covenant of renewal

being an independent covenant, may fall without impairing the grant for the twelve years.

The referees were right in holding that the plaintiff had a right to quit the family of the defendant whenever he became dissatisfied. The language of the covenant is, that if at any time the said party of the first part shall become *dissatisfied with living with the said party of the second part*, then the said party of the second part is to pay all reasonable charges for the board and necessary expenses of the said party of the first part. It is a case where the law will not undertake to say for the party he must be satisfied and has no right to be dissatisfied with living in this family; for the party by the express terms of his contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family, is a matter which the law will not assume to determine for him. Neither will it do the converse, and say he had no cause to be discontented and dissatisfied and therefore he cannot be regarded as dissatisfied. The agreeableness or disagreeableness of the society and state of things about him in the family are left to his own tastes and feelings to determine If the defendant is right in the construction which he puts upon this clause of the contract, and we are to hold that the plaintiff had no right to quit without good cause arising from a neglect of the defendant to perform his duties under the contract, towards the plaintiff, then the clause of the contract is wholly superfluous, and is divested of all meaning and legal effect; for if the defendant has not performed his duty to the plaintiff, under the covenant, then the plaintiff would be justified in leaving, were there no such clause as this in the contract. The defendant's construction of this contract, therefore, deprives this clause of all legal effect whatever—an interpretation never indulged if it can be avoided.

The referees erred in rejecting the evidence offered, to prove a set-off. This lease was no evidence of a settlement of accounts between the parties, within the principle of the case of *De Freest* v. *Bloomingdale and others*, (5 *Denio*, 364,) and the other cases referred to. The lease itself shows to what trans-

actions it was intended to apply, and what matters it embraced. It is most manifest from the instrument itself that it did not embrace any thing else. It is no answer to the rejection of this evidence that the plaintiff had given some evidence tending to show that all the accounts between the parties were settled at that time. The defendant had a right to overthrow this evidence, and I think there was not even *prima facie* evidence of a settlement given, and that the defendant had a right to ask the jury to find that there was no settlement proved. There must be a new trial granted for this cause alone; costs to abide the event of the action.

[Delaware General Term, July 8, 1856. *Gray*, *Shankland* and *Mason*, Justices.]

Nichols *vs.* Moody.

A public agent, acting in the line of his duty, is not personally liable upon contracts made by him on behalf of the government; unless it appears that the credit was given to, or the labor performed for, the agent himself, and on his agreement and promise to pay; or the fact of his being a public agent was unknown, and not disclosed at the time of making the contract.

A distinction exists between public agents and those of a private character, in respect to their personal liability.

Ordinarily, an agent contracting in behalf of the government, or of the public, is not personally bound by such contract, because it is not to be presumed, either that a public agent intends to bind himself personally, or that a party contracting with him in his public character means to rely upon his individual responsibility.

A collector of the customs of the United States government is not, in the absence of an express promise to pay, liable for the wages of a person employed by him as night watch and oarsman.

The doctrine of *respondeat superior* applies to such a case.

THIS action was commenced before a justice of the peace of St. Lawrence county. It was for work and labor, and a separate count in the complaint averred that the defendant, in the month of April, 1854, hired and employed the plaintiff

to work for him, at the price or sum of $30 per month, and that the plaintiff worked for the defendant, under the said agreement, from the 15th of August, 1854, to the 1st of January, 1855. The defendant denied the allegations of the complaint. On the trial the plaintiff proved by *R. M. Barns*, that the defendant was collector of customs for the district of Oswegatchie, and entered upon the duties of his office on the 21st day of August, 1854. The witness testified, "The plaintiff was around the office. He commenced stopping there from about the time the defendant took the office. The defendant told me to go to a certain place, the plaintiff to another place, Lascelles to another, and Low to another. We were sent to watch what was coming over. I heard the defendant say, two or three times, that he had sent the plaintiff out to watch. I saw the plaintiff get the oars, and he and the defendant went off in a boat together. It was about 8 or 9 o'clock in the evening. I heard the defendant say that he had the plaintiff with him, such a night, and that he thought the plaintiff considerable of a coward." On being cross-examined, the witness further testified that the plaintiff informed him that he was there as a *secret informer*. The informer is entitled to one quarter of the seizures made. *Smith Low*, another witness for the plaintiff, testified that he was watchman of the revenue in the custom house at Ogdensburgh; that he had been out with the plaintiff four or five times; twice they were gone from 9 P. M. till 2 or 3 in the morning. The plaintiff acted as night watch and oarsman, during the months of August and September; had known of the plaintiff being out other times, when he was not with him, but could not say how often. The witness further testified that any one has the right to inform, and is entitled to one quarter of the seizure, if one is made. He had heard the defendant say to the plaintiff, "Well, Nichols, do you intend to get a quarter to-night?" *C. W. Lascelles* also testified for the plaintiff, that he knew that the plaintiff had been out watching several times, since the defendant had been in the custom house. He was up and down the St. Lawrence river, at different points, with the witness, by direction of the defendant. The witness

went with the plaintiff, the last time he recollects of, first to the rail road depot, at the suggestion of the plaintiff. On being asked what, in his opinion, the services of the plaintiff were worth per month, the question was objected to by the defendant's counsel as immaterial. The court received the evidence, and the witness answered that he could form no opinion of what the plaintiff's services were worth, for he did not know how much he was out. It was worth, the times he was out with the witness, 6 or 8 shillings per night. He knew that the plaintiff was about the office from the time the defendant came in, in August, until after election the same year. R. M. Barns, on being recalled, further testified that he had been in the office every day but two, since the defendant had held the office of collector. The plaintiff came into the office almost every evening during the time, until almost election time, in November, 1854. He would come in and sit down, and sometimes in the daytime. There was no particular duty in the office that he could do. He had met the plaintiff several times, when he had been out, and "talked things over with him." He had heard the defendant ask him, on some occasions, where he was, and what he had been doing the night before. Heard both the plaintiff and the defendant say that the defendant had paid the plaintiff five dollars, but neither said what it was for. The government pays $20 per month for services of night watch and oarsmen. A witness on the part of the defendant testified that the plaintiff went over the bridge with him, one night, and told him to go around and look in that way, unless he had the power to seize a thing when he saw it.

The testimony being closed, the defendant's counsel moved for a nonsuit, on the ground that if any services were proved by the plaintiff they were performed for the government, and that the defendant was not individually liable therefor. The court denied the motion, and the jury rendered a verdict in favor of the plaintiff for $51.25 damages, for which, with costs, the justice rendered judgment, being their verdict upon the calculation that the plaintiff had proved, to their satisfaction, seventy-five nights' services, at six shillings per night, and de-

ducting the sum of five dollars paid by the defendant. The county court of St. Lawrence county affirmed the judgment and the defendant appealed to the supreme court.

Brown & Spencer, for the plaintiff.

Morris & Nary, for the defendant.

By the Court, C. L. ALLEN, P. J. The plaintiff failed entirely in establishing, by proof, the special count in his complaint. If he had made out such a contract as in that count alleged, he would probably have been entitled to recover. It has undoubtedly been established, by a great number of cases, that a person acting as a public agent may contract with an individual in such a manner as to make himself personally liable; but the facts and circumstances must, in such cases, show the contract to be very special, and that the party gave the credit to, or performed the labor for, the individual alone, and on his promise and agreement to pay; or the fact of his being a public agent must be unknown, and must not be disclosed at the time of making the contract. The great inquiry in such cases is, to whom was the credit intended to be given. (*Dunlap's Paley on Agency*, 376, 7, *and notes.* 1 *Term R.* 180. 2 *Kent's Com.* 632. 3 *Dallas*, 384. 12 *John.* 385, 444. 15 *id.* 1. 19 *id.* 63. 7 *Cowen*, 451. 8 *id.* 191.) And even an express promise to pay is not always the criterion. But much depends upon the question whether the agent intended to make himself personally liable. (*Walker* v. *Swartwout*, 12 *John.* 444. 2 *Wend.* 375.) A very different rule prevails in regard to public agents from that which is applicable to those of a private character. Ordinarily, an agent contracting in behalf of the government or of the public, is not personally bound by such a contract, although he might be, perhaps, if it were an agency of a private character. The reason of the distinction, say the elementary writers, and the adjudged cases, is, "that it is not to be presumed, either that the public agent intends to bind himself personally, in acting as a functionary of the gov

ernment, or that the party dealing with him in his public character, means to rely upon his individual responsibility. On the contrary, the natural presumption, in such cases, is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfill all its just contracts, far beyond that of any private man, and that it is ready to fulfill them, not only with good faith, but with punctilious promptitude and in a spirit of liberal courtesy." (*Story on Agency, ch.* 11, § 302, *and cases cited in notes. Dunlap's Paley on Agency*, 376, 377, *and notes.*)

This has been the doctrine from the leading case of *Macbeath* v. *Haldiman*, (1 *T. R.* 172, 181,) followed as late as the case of *Girley* v. *Lord Palmerston*, (3 *Brod. & Bing.* 275,) in England, through a great variety of adjudications in our own country. (*See Hodgson* v. *Dexter*, 1 *Cranch*, 345; 1 *Mass. Rep.* 208; 9 *id.* 490; 6 *id.* 253; 3 *Dallas*, 384.) The cases of *Macbeath* v. *Haldiman*, and *Hodgson* v. *Dexter*, were recognized and followed by the supreme court of this state, in *Walker* v. *Swartwout*, (12 *John.* 444, 448,) virtually overruling the case of *Sheffield* v. *Watson*, (3 *Caines*, 69,) which has been pronounced more than once, "*an extraordinary decision.*" In the case just cited as overruling it, the defendant was quarter master general of the United States army, which arrived at French Mills, Franklin county, about the 20th November, 1813. He directed certain boatmen who were with the army (and the plaintiff among the rest) to go to work for the use of the army, and promised that they should each be allowed for their services $2 per day. The plaintiff worked, accordingly, about six weeks, when he applied to the defendant, who was about to leave French Mills, for a certificate as evidence of the contract, and of the time he had worked, and the defendant replied, "*my word is sufficient*," and told the plaintiff to go to work, and he would pay him, when his work was done. The plaintiff continued to work under this assurance, for several weeks afterwards, when he was discharged without pay. He brought his action against the defendant, and a verdict was rendered in his favor subject to the opinion of the supreme court. Thompson, Ch. J

was of opinion that he was entitled to recover, upon the express promise. But the rest of the court thought otherwise; and Spencer, J., in delivering the opinion of the court, remarks that "whether the court, in *Sheffield* v. *Watson*, made a correct application of the principles recognized and established in the cases of *Macbeath* v. *Haldiman* and *Hodgson* v. *Dexter*, to the facts before them, might admit of some doubt, but the court certainly did not intend to overrule them." After commenting upon the opinion of Judge Livingston, in the case of *Sheffield* v. *Watson*, and observing that the court were not to be considered as committed, by the peculiar phraseology or illustrations of the judge who gave the opinion, Justice Spencer proceeds to remark: "It has been argued in this case, that the defendant promised to pay the plaintiff for it, when his work was done. The same argument was urged in *Hodgson* v. *Dexter*, and the fact in that case was, that Mr. Dexter covenanted, under seal, to keep the premises in good repair, &c. But the court holding it to be a contract entirely on behalf of government, considered the obligation to be on the government only, and not a personal undertaking. The facts in this case (he adds) show very clearly that it never was in the contemplation of either party, originally, until some time after the labor was done, that the defendant should be personally responsible." And again he remarks: "I entirely agree with Ch. J. Marshall, that to hold a public agent, acting in the line of his duty, liable for contracts made on account of government, would be productive of the most injurious consequences to the public as well as individuals, and no prudent man would consent to become a public agent, if he should be made personally responsible on the public account. This is not the case of an isolated boatman. The same principles which will render the defendant liable in this case will, for aught I perceive, make him liable to all the boatmen descending the St. Lawrence with the army, for it seems he set them all at work, at $2 per day, and hence the greater improbability that he meant to subject himself."

I have quoted thus largely from this opinion, because it is

peculiarly applicable, in many of its facts and circumstances, to the case we are now considering, and is a much stronger one, in many of its bearings, in favor of a recovery, than the present. In that case there was an express promise to pay; in this there is no such promise.

The same principle was again sanctioned in *Rathbon* v. *Budlong*, (15 *John.* 1,) and in *Bronson* v. *Woolsey*, (17 *id.* 46.) In the latter case the defendant, a captain in the United States navy, employed the plaintiff, with his vessel, to transport ordnance and stores on Lake Ontario, and finally caused it to be sunk in the lake near Oswego. It was decided that he was acting on behalf of the government, and could not be held personally responsible. So in the case of *Olney* v. *Wickes*, (18 *John.* 122,) the court said that "where a public agent acts ostensibly in the line of his official duty, his contracts are public and not personal." See also 1 *Cowen*, 513; *Fox* v. *Drake*, (8 *id.* 191;) *Belknap* v. *Reinhart*, (2 *Wend.* 375,) in which a promise was made by the defendant to pay a certain reward for apprehending a deserter. See also *Osborne* v. *Kerr*, (12 *Wend.* 179,) which was an action against a canal superintendent, and where the court placed their decision upon the ground that the case did not show that the defendant intended to bind himself personally. Also *Chitty on Con. 8th Am. ed.* 251, 2; *Story on Agency*, 388, § 302, *&c.; Dunlap's Paley*, 376 *to* 379, *and notes.*

Now what are the facts, in this case, upon which the defendant relies, to distinguish it from those above cited. As already remarked, no express promise was proved, nor is any pretended. The plaintiff relies upon the implied undertaking on the part of the defendant, to hold himself individually responsible. The only evidence is, that the plaintiff being "about" the custom house after the defendant was appointed collector, acted voluntarily as a night watch and oarsman, or as a secret informer. He was directed by the defendant, in a few instances, to repair to particular points on the river, and he was found to be at the office almost every evening. In a word, he acted much as others did, about the office, who were in the same business; the de-

fendant asking him, on some occasions, if he "*intended to get his quarter*" that night. The question is, did the defendant intend to make himself personally liable to the plaintiff, for his services, and did the plaintiff so contract, or intend to contract? There is no evidence from which such an intent may be inferred. This is not, as was remarked in *Walker* v. *Swartwout*, the case of an isolated boatman. Every boatman and night watch engaged in the business could probably make as much proof against the defendant as did the plaintiff in this action, and would be as much entitled to recover. No one can for a moment suppose or believe that the defendant ever intended to make himself personally responsible to all these men. The plaintiff well knew that the defendant was collector, and that the services he was performing were for the benefit of the government, and that the defendant was acting in the line of his duty as collector, in obtaining such services, and that the government paid $20 per month for services such as those rendered by him. It was his duty, if employed at the office, to present his account, duly verified according to the regulations of the department. (*Gordon's Dig. U. S. Laws, p.* 95, § 395.) The last report of the secretary of the treasury shows that the sum of $240 was appropriated for the services of night watch and oarsmen at the port of Oswegatchie, for the year 1855. The collector has the right, and it is his duty, if necessary, to employ such persons, who must be sworn in, and the collector is not personally responsible for their services, any more than for those of any other officer under him. His directions to the plaintiff to go to particular places to watch, probably arose out of his power to employ on behalf of the government, and they raise no presumption that he intended to make himself personally responsible. The plaintiff did not himself pretend so, until after his discharge. At all events, it is to my mind very clear that he did not bestow his labor upon the credit of the defendant as an individual. It is more than probable that he was acting, as he told the witness Barns, as "*a secret informer*," and that his remaining about the office was to obtain one quarter of the seizures that might be made, on his information

If he acted in that capacity there was no privity of contract between him and the defendant, from which an implied promise could be raised. The defendant did not need such service, and if it was performed, it was for the plaintiff's own benefit. (*Gordon's Dig.* 951, § 3286.) But upon the other view, no implied promise can be raised against the agent; and no express promise was proved. The doctrine of *respondeat superior* applies, and the justice should have nonsuited the plaintiff. It is said the verdict was not supported by the evidence, as to the amount. This is probably correct, but as it was entirely against law and evidence, it cannot be sustained for any amount, and the judgment rendered upon it, and that of affirmance by the county court, must be reversed, with costs.

[Saratoga General Term, July 8, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

Stuart *vs.* Hawley.

22 619
44 425
61 113
6h 323
26h 252
51h 588
51a 487

Where an individual sets fire to his fallow, wood and timber, for the purpose of bringing the land into cultivation, and the wind rises, and causes the flames to spread, and communicate the fire to his neighbor's land, and the crops and grass of the latter are injured and destroyed, no action will lie, without some proof of negligence or misconduct on the part of the person building the fire.

Such negligence or misconduct must be established, by legal evidence. The mere fact that the fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, will not be sufficient to entitle the party injured, to recover.

THE plaintiff commenced this action against the defendant, in a justice's court of St. Lawrence county, for negligently and carelessly setting fire to his fallow, wood and timber, and alleged that in consequence thereof the fire spread, and burned, injured, damaged and destroyed the plaintiff's land, hay and timber adjoining. The plaintiff claimed to recover damages, to the amount of $100. The defendant denied the allegations in the complaint. On the trial it appeared in evidence that on the

17th of July, 1854, the defendant set fire to his fallow, which had been previously burned over, in May. The heaps were logged up and set fire to. The fire did not burn much until the 20th of July, when the heaps burned up, and the fire began to spread. It was a very dry time when the fire was set, there having been no rain since the latter part of June previous. The wind blew very hard on the 20th of July, and the fire spread, and burned over a lot of Mr. Lockwood's, adjoining the defendant, and on the 26th the wind increased and blew a gale, and the fire spread from Lockwood's lot on to the plaintiff's lot, burning and destroying his grass, hay and grain, to the value of $170 or $180.

The plaintiff recovered a judgment for $100, with costs, which the county court affirmed, and the defendant appealed to this court.

Judson & Powell, for the plaintiff.

Myers & King, for the defendant.

By the Court, C. L. ALLEN, P. J. In the case of *Clark* v. *Foot*, (8 *John.* 421,) it is said by the court that "*it is a lawful act* for a person to burn his fallow, and if his neighbor is injured thereby he will have his remedy by action on the case, if there be sufficient ground to impute the act to the negligence or the misconduct of the defendant or his servants." And the remark is put forth that if a man's house "should get on fire and burn his neighbor's, no action would lie, because it was lawful for him to keep a fire. The loss in all such cases is *damnum absque injuria*."

There is no dispute about the main facts in this case. There was considerable rain the latter part of June, 1854, but from that time to the 17th of July, when the defendant set fire to some log heaps in his fallow, it had continued dry. Some of the witnesses say it was a very dry time. The place had been burned over the May previous, and there were no bush near. It was low swamp land. The heaps were not very dry, when

first fired, and did not immediately burn. From the 17th to the 20th of July it continued very hot and dry, though it rained a very little on the morning of the 17th. On the 20th the wind commenced blowing violently, and the fire communicated to Lockwood's lot, which was a pasture, lying between the plaintiff's and the defendant's lots. On the 26th of July the wind blew a gale, and the fire was blown across Lockwood's lot and extended to the plaintiff's, and burned his grass, crops, &c., occasioning a loss, which was stipulated at $100. The only evidence of any carelessness on the part of the plaintiff is, that the fire was set in a *dry time in July*. But this single fact, under the circumstances, does not entitle the plaintiff to recover. It was set on low swamp ground that had once been burned over. There were no brush near. The stumps were wet and did not burn well, and in fact were not all consumed. It is a well known fact that fire will not so readily run on ground which has been before burned over, as at first. It was set on a day which looked likely for rain. It did rain in the morning, though not to a great extent.

It appears to me it cannot be contended that the defendant selected an improper time, or that it was a careless act in him, to set fire to his own fallow, in a month usually chosen for such a purpose. He certainly could not be supposed to know that He who in his infinite wisdom controls the seasons, and holds the winds in his fists, would have suffered the drouth to continue, or have permitted the gale to waft the fires across an adjoining pasture lot to his neighbor's land, on the 26th, and thus do him an injury entirely unexpected and unintentional. The plaintiff should have established the negligence or misconduct, by legal evidence. This, I think, he failed to do. (*See case before cited, and Livingston* v. *Adams*, 8 *Cowen*, 175.) The evidence of want of attention on the part of the defendant, if it be conceded that he did nothing to prevent the fire from spreading, does not help the plaintiff's case. In *Clark* v. *Foot* the defendant refused to do any thing, except to prevent the fire from injuring his own premises; and yet the court held it furnished no ground of action. The doctrine contained in *Clark*

v. *Foot* is fully recognized and approved, and in this state is now settled, in the case of *Radcliff's Ex'rs* v. *The Mayor &c. of Brooklyn*, (4 *Comst.* 195, 200.) A great variety of cases are there collected and commented upon by Judge Bronson; and the conclusions to which the court arrived fully dispose of the present case.

The plaintiff should have been nonsuited, and the jury having found against the law and the evidence, the judgments of the county court and of the justice must be reversed, with costs.

[Saratoga General Term, July 8, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

Barber *vs.* Lyon.

B. having agreed to make a wagon for M., the latter gave to L. a written order upon B. for such wagon, which order B. accepted and handed back to L. The wagon was afterwards delivered to L. by B. upon the order. *Held*, that this was an equitable assignment of the wagon to L., and that B. could not recede from the undertaking, and maintain an action against L. for the price of the wagon.

Where a paper is shown to be in the hands of a party, and he declines to produce it, upon notice, the inferences are to be taken, in connection with the proof of its contents, most strongly against him.

THIS action was commenced before a justice of the peace of the county of Saratoga, to recover the price of a wagon, alleged to have been sold by the plaintiff to the defendant in the year 1853. The trial was by jury, and a verdict was found in favor of the defendant, and the justice rendered a judgment in his favor, for costs. The plaintiff appealed to the county court of Saratoga, and the judge of that county having been the counsel for the defendant certified the appeal to this court. The defense as set up in the answer, was that in February, 1853, one Gad S. Miller was indebted to the defendant, for goods before then sold to him by the defendant, and that he (Miller)

gave to the defendant an order on the plaintiff for a one horse buggy wagon, (the one in question,) which the plaintiff was then making for Miller; that the order was, afterwards and during the same month, accepted by the plaintiff, who agreed to deliver the wagon thereon, and afterwards did deliver it.

On the trial, the plaintiff proved that about the 1st of June, 1853, the parties met, at a turnpike gate, tended by the witness, the plaintiff coming from the north with the wagon in question hitched to the one in which he was riding, and the defendant coming from the south in another wagon. The plaintiff unhitched the hind wagon and drew it out into the road. The defendant then stepped up and handed the plaintiff a paper about two inches wide, and asked him if he would accept of it. The plaintiff, after looking it over, said he would accept of it as far as it went, and said he should not deliver the wagon to the defendant, unless he would be responsible to him for the balance. The defendant replied, that he should do just as he agreed. During this conversation the defendant was hitching his horse to the new wagon, and fixing his harness. The plaintiff forbade the defendant hitching to the wagon, several times, unless he would agree to become responsible for the balance. The defendant hitched to, and finally drove off, saying, as he struck into a pretty fast trot, that he would not be responsible for one mill. The plaintiff hitched the old wagon left by the defendant on to the one in which he was riding, and drove off with them. This part of the evidence was objected to by the plaintiff, but was received by the court. The plaintiff retained the paper, but did not read it aloud. A notice was served upon him to produce it at the trial. But on being called upon, his counsel declined to produce it. Another witness for the plaintiff testified, that a year ago the spring before, the defendant told him that the plaintiff was making him a wagon, and he did not know but it would cost him $130. The defendant got the wagon soon after this conversation. After proving the value of the wagon, the plaintiff rested. The defendant's counsel moved for a nonsuit, on the ground that the plaintiff had not made out a cause of action; and that if any cause of action was proved, it was in

trover and not on contract; and also that the paper should be produced, to show how much the plaintiff was entitled to recover. The court denied the motion, and the defendant proved that, some time before he received the wagon, he met the plaintiff, and inquired of him in relation to the wagon he was making for Miller. They went to the plaintiff's shop and looked at the wagon, and then the defendant produced a written order and showed it to the plaintiff, and told him he could trade with Miller and get the wagon if he, the plaintiff, would accept the order. The plaintiff took the order and looked at it, and said he would accept of it. He said he had no pen and ink in the room, but he would go down and sign it. He went out with the paper, and in a few minutes returned, and gave it back to the defendant, and the witness did not see it after that time. The witness did not read the paper, but the defendant said to the plaintiff, when he handed it to him, that it was an order from Miller, on the plaintiff, for the wagon. The plaintiff said the wagon would cost $125 or $130, and that it would be finished about the first of wagoning.

Another witness for the defendant testified that he saw the plaintiff start with the wagon, from his shop, on the day the defendant received it; and that he returned some time afterwards, without it. On his return he showed the witness a paper or order in writing, which was addressed to the plaintiff, and read, as near as the witness could recollect, as follows: "Let the bearer (or order) have such a wagon as we have talked of (or agreed upon.") It was signed by Gad S. Miller, and under Miller's name was subscribed that of the plaintiff. Some other evidence was introduced, which it is not necessary to detail.

Hoag & Crane, for the plaintiff.

J. B. McKean, for the defendant.

By the Court, C. L. Allen, P. J. The testimony in this cause shows conclusively, to my mind, that the plaintiff had agreed to make a wagon for one Miller; that Miller gave to the

defendant an order upon the plaintiff for that wagon, which was accepted, and the wagon afterwards delivered upon it. There is some little obscurity about the terms of the order, owing to the difficulty of proving its exact reading, by parol. It was shown to be in the hands of the plaintiff, and he declined to produce it upon notice; and under these circumstances the inferences are to be taken, in connection with the proof, most strongly against him. He could have removed all doubt by its production; and his suppression of it, upon the trial, shows that the evidence, at least, did not exceed its contents. The plaintiff, by accepting the order, induced the defendant to look to him instead of Miller; and had he afterwards refused to deliver the wagon, he would have been liable to an action on the part of the defendant. In *Morton* v. *Naylor*, (1 *Hill*, 583,) it was held that an order not payable in money, and drawn on a particular fund or property, is an equitable assignment of the fund on which it is drawn, and that the drawee, being notified of the assignment, must pay accordingly, though there be no formal acceptance. In that case, where a landlord, for value received, gave an order on his tenant to pay one Warner the rents accruing during a certain time, which the tenant, on the order being presented, promised to do, it was decided that he was bound to do so, notwithstanding the landlord subsequently ordered the tenant not to pay. (*And see* 5 *Paige*, 640.) But the order here was *accepted* in writing, as appears from the testimony. And if any balance remained to be paid upon it by the defendant, (*see* 2 *Hill*, 582,) the plaintiff had it in his power to show that fact, by producing and giving it in evidence. After accepting it, and delivering it back to the hands of the defendant, neither the plaintiff or Miller could have done any thing to change his, the plaintiff's, liability to the defendant. (1 *Hill*, 583. 3 *Paige*, 373.) After the acceptance of the order, the parties met at the turnpike gate, as testified to by one of the witnesses, the plaintiff having the wagon in question, and having evidently started with it from his place of residence for the purpose of delivering it, and the defendant meeting him for the purpose of receiving it. The plaintiff immediately

placed the wagon on the side of the road, as if for delivery, and the defendant handed him a paper, evidently the accepted order, and asked him if he would accept of that. The plaintiff said *he would accept of it as far as it went.* How far did it go? Or what were its contents? In the absence of the order, which the plaintiff refused to produce, and under the testimony, the jury were left to infer that it was an unconditional accepted order for the delivery of the wagon to the defendant, and they found, most probably, in accordance with the facts. At all events their verdict was warranted by the evidence, and cannot be disturbed. There certainly was no evidence on which to support a contract of *sale* and purchase of the wagon; the defendant declaring, as he drove off with the wagon, that he would not be responsible for a single mill.

There was no objection to the evidence that the plaintiff took the wagon left by the defendant in the road. It was proper to prove what was said or done by either party, at the time the parties met, and when the defendant received the wagon.

Whether the proof of what the plaintiff said, at the time he showed the order to the witness, Drake, was proper, it is not necessary to determine. The question was objected to; but it does not seem to have been insisted upon by the plaintiff's counsel, nor decided by the justice.

The judgment of the justice must be affirmed, with costs.

[Saratoga General Term, July 8, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

Smith *vs.* The President, Directors and Company of the Essex County Bank.

Where the payee of a note which is made payable at a bank, indorses the same and deposits it with the bank for collection, the bank becomes the agent of the payee, and not of the maker; and after the note has been paid, no omission or misapplication of the money by the bank can prejudice the maker, he being, by such payment, absolutely discharged from the debt.

Hence, if the maker calls at the bank and pays the amount due upon the note, and takes it up, and the bank neglects to pay over the money to the holder, the maker cannot maintain an action against the bank, founded upon such neglect to account to the holder for the money.

THIS was an appeal from a judgment of the county court of Essex county, affirming the judgment of a justice of the peace. The complaint averred that one Hiram Gates, on the 18th of January, 1854, paid to the defendants the sum of $83, or thereabouts, to be applied upon a certain note made by Gates to Barney B. Boynton for the sum of $81.82, and dated November 14, 1853, and the interest, and protest fees on the same which sum the defendants promised to pay to Boynton; but that they had neglected and refused to pay it, and that on the 29th day of July, 1854, Gates, for a valuable consideration, transferred his claim for said money, so paid, to the plaintiff. The defendants denied the complaint, and for a further answer averred that if the money was ever paid, it was paid to the defendants as agents of Boynton; and they further answered that before the assignment Boynton prosecuted Gates for the same debt, and Gates put in his defense to the action, and it was decided against him.

On the trial, Gates was introduced and sworn as a witness for the plaintiff, and testified that on the 18th of January, 1854, he paid and took up the note; that the amount was $81.80, or $82.80 odd cents; that he paid it to the teller, at the counter of the bank, in $10 Essex county bills, except one $5 bill on the same bank, and received back the change. On his cross-examination, he further testified that it was about 2 o'clock P. M. when he paid the money. No one was in the bank, at the time, except the teller and himself and Mr. Thompson, the

cashier; that he never went into the bank and talked about the note and took out his money, but once; that it was done in a great hurry, as he was about starting for Burlington at the time. That he got the money from Mr. Talmadge some two or three weeks previous, and took it that day from his bureau drawer. That Thompson sat at the stove, reading a newspaper, at the time, and did not seem to notice his paying the note to the teller. The witness did not know, at the time he paid it, whether the note was left for collection, or whether the bank owned it. Mr. Boynton, the payee of the note, testified that the bank had never paid him the amount of the note. That it was left by him with the bank for collection, where it was made payable. That he had a conversation with Gates, the day following the protest of the note, which was the 16th of January, 1854, and requested payment of the note. Gates said he would attend to it. Some three or four days after that he spoke to Gates again about it, and Gates said if he got the money on that $600 note he would pay it on his return from Burlington; and said he had $400 in his room, which he had been keeping for another purpose. He met him once again, the second week after the protest, and spoke to him again about the note. He then went to his room and showed him the note. He then went to the bank, and was informed the note was not paid, and that if Gates had it, he had it wrongfully. Martin A. Seymour, the teller of the bank, testified, for the defendants, that on the day Gates swore the note was paid, he was in the bank and talked about it; it was then protested. The witness showed him the note and another one which was becoming due to Gates. Gates expressed disappointment that the note was not yet due, as he expected to pay the Boynton note with its avails. He handed the two notes to Gates to compare, and never saw them after. That Gates did not pay any thing on the note. He missed it in about three weeks after its maturity. That they generally marked the word "*paid*" on notes, when they were taken up. That there was no entry on the books of the bank of the note's being paid. That they made an examination every night, to see if their amount of cash agreed with

their entries. That they did so on the evening of the 18th of January, 1854. At or about that day Gates made application at the bank to have a large note discounted, which was declined. The witness, for the sake of buying peace, as he swore, once offered to pay one half the note, but was advised that it would not answer. It appeared that one other note was produced by the plaintiff, which had been taken up at the bank, but had not been marked with the word "*paid*;" and also that the witness had once overpaid Mr. Comstock $50 in a count of money, which Mr. C. afterwards returned to the Bank.

Mr. Thompson, the cashier, testified that he was in the bank on the 18th of January, 1854, and was present when Gates came in to look at the notes. The witness had been conversing with Gates, by the stove, outside the counter. Gates had a note made by Reynolds and Tufts for $600, and wanted the witness to discount it individually, which he declined to do. He then went to the counter and conversed with Seymour, in relation to the notes; saying, as he went, "if he could not get money on his paper, he could not pay." Seymour showed him some notes, and Gates said he was in hopes one note would pay the other. Did not see him pay Seymour any money, and thinks if he had, he must have seen it. The cash account of that day agreed with the books. The note was never owned by the bank. It was left there by Boynton for collection. All the parties live in Keeseville. It appeared from all the evidence that Gates was never in the bank but once, to look at the notes. Harvey Carter testified that he was a justice of the peace of Chesterfield, in June, 1854. That in that month there was a suit tried before him, in which B. B. Boynton was plaintiff and Hiram Gates defendant. The action was brought to recover the amount of the identical note, which Gates in this suit claims to have paid the bank, and the defense to that suit was, such payment. Mr. Seymour was sworn and testified, and the justice rendered judgment for the plaintiff against the defendant Gates, for the amount of the note and interest, on the 5th of June, 1854. This evidence was objected to by the plaintiff's counsel as immaterial and irrelevant, but was received by the court

The testimony being closed, the court, after taking time to deliberate, rendered judgment in favor of the plaintiff for $89.69, damages and costs, which the Essex county court affirmed, and the defendants appealed to this court.

Finch & Smith, for the plaintiff.

S. Ames and *A. C. Hand*, for the defendants.

By the Court, C. L. ALLEN, P. J. The evidence on the part of the plaintiff shows that the note was made payable at the defendant's bank and indorsed by Boynton, and there left for collection. That after maturity and protest it was *paid* by Gates to Seymour, the teller of the bank, who received it from the teller, as he swears, when he paid it. This is the theory of the plaintiff's case, and the justice has so found the facts, although they are denied by the defendants. Admitting the finding to be correct, I do not perceive how the plaintiff can be legally entitled to recover. The bank was the agent of Boynton, and not of Gates, and no omission or misapplication of the money could prejudice Gates, after payment. If he testified to the truth when he swore that he paid the note to Seymour, and took it up, then such payment was an absolute discharge of him, and whether Seymour, as teller of the bank, accounted for it, or paid it over to Boynton, was a matter of no sort of consequence, so far as he, Gates, was concerned. He had entirely absolved himself by paying the note, at the place where it was made payable, and thereby *canceled* his debt. (*Story on Bills, sec.* 201, *&c. Howard* v. *Ives*, 1 *Hill*, 263. *Dunlap's Paley on Agency*, 91, *note* 274, 5. 2 *Kent's Com.* 630. *Montgomery County Bank* v. *Albany City Bank*, 3 *Seld.* 459. *Colvin* v. *Holbrook*, 2 *Comst.* 126. *Com. Bank of Penn.* v. *Union Bank of N. Y.*, 1 *Kern.* 203. *Allen* v. *Merchants' Bank of N. Y.*, 22 *Wend.* 215, 225. 2 *Parsons on Cont.* 126. *And see* 3 *Hill*, 560; 1 *Peters*, 50; 12 *Conn. Rep.* 304; 23 *Pick.* 330; 15 *Wend.* 482; 20 *id.* 321; 12 *id.* 178; 4 *Burr.* 1984; 5 *Denio*, 639; 3 *Comstock*, 327.)

The bank was only liable to Boynton, its principal, and can in no sense be said to be the agent of, or liable to, Gates. Boynton was the *owner* of the note, and had left it with the bank for *collection*. And that institution would have been liable to him for any neglect or omission on its part, or for a refusal to pay over the money to him. All the authorities above cited show that the bank, in all such cases, is the agent of the owner of the note, and not of the maker, who is bound to make payment where, by the terms of the note, it is made payable. In some of the cases, the bank was held liable for losses sustained by the holder and owner of the note, by not properly charging an *indorser*. It was well said, on the argument, that "if the bank, in such cases, could be said to be agent for the maker, it is agent for *prior* indorsers, whereas its neglect has discharged such indorsers and made itself liable; that is, the neglect of a bank, as agent, has discharged its own principal."

The justice, while he admits that if the evidence of Gates is the true statement of facts, the payment made to the bank operated instanter as a satisfaction of the note, and would have constituted a perfect bar to the action in favor of Boynton, against Gates, yet contends that inasmuch as the bank *denied* the receipt of the money, it must be considered as the agent of both parties, and that having been intrusted with the money, by Gates, to pay the note, and not having done so, it is therefore liable to an action by him to recover it back. But, to come to a conclusion that the plaintiff is entitled to recover, he assumes, as he must, that Gates actually paid the note to the teller, and took it up. No matter whether that fact is *denied* or not. The justice has so found, and the county court declares that he has found correctly. Then all relation between the bank and Gates, if it ever existed, entirely ceased, and Gates became discharged from all liability on the note. His defense to the suit brought by Boynton, afterwards, against him, would have been perfect, if he had established the fact of payment, satisfactorily; and if he failed from want of proof, or by the error of the court, his remedy was not changed, so far as the bank was concerned, and it was no more liable than it was before that trial. The counsel

for the plaintiff insists that the bank was at least as much the agent of Gates as of Boynton, and that the bank agreed with Gates to receive the money *and pay it over to Boynton.* The bank received the note, in their ordinary mode, as collecting *agent* for Boynton. When Gates paid it to the latter he was absolutely discharged from all liability. He took it up. It was in his possession, and was entirely canceled. If Boynton had prosecuted the bank, upon Gates' evidence, uncontradicted and unexplained, he would most undoubtedly have been entitled to recover. The bank became the agent of the holder, by taking the note to collect. It was indorsed by Boynton, for the express purpose of authorizing it to receive payment. Payment was made by Gates to the bank, the agent of Boynton, according to the plaintiff's theory, and the debt, as to him, became extinguished. There was nothing left for it, as agent of Gates, to do. It had applied the money in payment of the note, as it had authority to do, and all liability ceased, so far as he was concerned. This is the most favorable view that can be taken, in favor of the plaintiff. It may be observed that the indorsement in blank, by the payee, and the possession by the bank, gave to it the legal title to the note. The bank was the legal holder of the note, so far as the maker was concerned; and unless it had been obtained by the latter by fraud, a payment to the bank as holder absolved the maker. The authorities already cited abundantly establish this proposition. And see *Chitty on Bills*, 229, 230; 2 *Kent's Com.* 89. Gates, then, when he paid the note, if he swears truly, paid it to the legal owner or holder, and from that moment it became fully canceled. But the first view taken is, in my judgment, the most satisfactory, and in accordance with the law and the facts.

This view, if correct, renders it unnecessary to consider the other points raised by the counsel for the defendant. Whether the action and judgment between Boynton and Gates, in which the fact of payment of the note to the bank was directly in issue, was so far an adjudication between the same parties or their privies as to be a bar to this suit, or not, I am not to be understood as expressing any opinion. It may, however

be remarked, in passing, that the defense set up in that action was that the defendant (Gates) "paid said note and protest at the bank, soon after the same was protested, to the agent of the plaintiff, and to the holder of the said note," and that Seymour was sworn, and testified to such payment.

Whether that suit was a bar or not, the pleadings and evidence tended to show that the bank was never regarded as the agent of Gates, and that the payment claimed to have been made by Gates, was a payment to the bank, either as owner, or holder, or agent of Boynton. But I do not dwell on this point. Neither must I be considered as passing an opinion upon the question whether the decision of the justice was supported by the evidence, or whether it is against the whole weight of evidence, or not. The evidence was certainly *contradictory*, and Gates, who was the only witness to prove payment of the note, stands contradicted by three witnesses, as to the most material facts. It is true he had the note in his possession after the alleged payment. But it is also true that the teller swears that he handed him the note to look at and compare with another, at the same time that Gates swears he paid it, and that he (the teller) has never since seen it until produced by Gates. Mr. Thompson and Mr. Boynton both swear to a state of facts entirely inconsistent with the idea of payment of the note. And it appears that the money, out of which Gates alleges he paid it, had been in his possession three or four weeks before it became due, and yet he suffered the note to go to protest, and paid the fees of protest, with the note, in two days thereafter. There are other inconsistencies which might be adverted to, but as I do not mean to express an opinion on this point, I forbear further comment.

The judgments of the county court and of the justice must be reversed, with costs.

[Saratoga General Term, July 8, 1856. *C. L. Allen, Paige, James* and *Roseboom*, Justices.]

THE TOWN OF FISHKILL *vs.* THE FISHKILL AND BEEKMAN PLANK ROAD COMPANY.

22 634
27 448
27 553
36 185
42 85
10h 554
14h 28
42a 18
42a 418
50a 566
74a 316
110a 237

A plank road company being about to construct a plank road from Fishkill to Beekman, entered into an agreement with the supervisor and commissioners of highways of the town of Fishkill, for the use of a certain highway in such town. By this agreement the supervisor and commissioners consented and agreed that the company should take and use forever the highway in question, or so much and such parts thereof as the company might require and should locate their road upon. As the consideration for this grant, the company agreed to keep said road, so occupied and taken by them, with all bridges across which their road should pass, in good and sufficient repair. In an action by the town against the company, for a breach of this agreement, in not repairing a bridge, the defense was that the highway and bridge in question had never been occupied and taken by the company for the use of their road, and therefore that they had never assumed their support. But it appearing that the company had taken possession and control of the highway and bridge in question, which were upon the direct route between one designated termination of the plank road and the other, and were a part of the highway which they had obtained the right to take; and that they had expended labor, laid down plank, and constructed their road upon and over them, in the same manner as they had done in respect to the residue of the road; *it was held* that these acts, in the absence of any explicit and legal declaration to the contrary, warranted the conclusion by the town officers, that the company meant to assume, and to use the bridge and that part of the road connecting with it.

Held also, that for all the purposes of the action, and of the contract, the company appropriated the highway as far as they constructed a plank track upon it, or assumed control of it.

Held further, that the town of Fishkill, in its corporate character, could not sue for a breach of the contract by the plank road company.

The inspection of a certain length of plank road, and the certificate of the inspectors, under § 34 of the plank road act, do not furnish conclusive, nor the best, evidence of the entire length of the road, and of the extent to which a highway has been appropriated.

Such inspection, and the certificate that it has been made, were not intended for any such purpose; but were designed only to ascertain the character of a road, after it has been completed, and whether it is a good and substantial road, in conformity with the law, so as to authorize the company to demand tolls for its use.

The compensation and damages for the use and occupation of a highway, by a plank road company, which the public officers are authorized by the statute to agree upon, need not be wholly estimated and paid in money. A part of the compensation may be in the shape of an executory agreement, by the company, to keep the road and bridges in repair.

Town of Fishkill *v.* Fishkill and Beekman Plank Road Co.

An agreement to that effect, made by the supervisor and commissioners of highways, is not void for an excess of authority by the town officers in making it, but is within the line of their duty and obligation.

An act of the legislature, entitled "An act to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes," contained eight sections. The first released the company from its obligation to build and maintain a plank road any further than the portion of the road which had been inspected and certified. The second authorized an abandonment of any portion of the road, and the third regulated the terms and conditions, and the manner, of effecting such abandonment. The next three sections authorized the company to relay their road with gravel instead of plank, inflicted penalties for shunning the toll gates, although within three miles of each other. The seventh section legalized all the preliminary acts in the organization of the company, the subsequent acts of the company, and of various public officers, from time to time, in relation to it; and the eighth section was the usual enactment giving immediate effect to the whole statute. *Held*, that there was no constitutional objection to including all these provisions in one law, inasmuch as they all related to one general subject—the relief of the plank road company, by altering its fundamental articles, and modifying its obligations. But that the statute was in conflict with the spirit and intention, as well as with the letter of the sixteenth section of article three of the constitution, which requires that the subject of every private or local bill which may be passed by the legislature shall be expressed in the title.

The whole of the act, with the exception of the first section, was therefore declared to be unconstitutional and void.

The whole power and capacity of towns, as corporations, are derived from, and conferred by, statute. Their authority to contract or assume liabilities is restricted to cases where such action is necessary for the exercise of their appropriate functions as corporations; and their power to sue and be sued is limited to cases where the assertion of their corporate rights, or the enforcement of their corporate liabilities, require such proceedings.

As a corporation, a town has nothing to do with, and no interest in, the highways within its limits. The roads are not the property of the town, nor is the town responsible for their condition or their repair.

It has no rights nor responsibilities in respect to public highways, for which it can either sue or be sued.

The control and management of highways and bridges are vested in the officers of the town who are chosen for that purpose.

MR. DEAN, for the plaintiff.

Mr. *Thompson*, for the defendants.

Town of Fishkill *v.* Fishkill and Beekman Plank Road Co.

EMOTT, J. The defendants in this action are a corporation formed under the general act of May 7, 1847, authorizing the incorporation of companies for the construction of plank roads. The road which they purposed to build was to extend from the Hudson river at Fishkill Landing through the towns of Fishkill and East Fishkill, to a point in the town of Beekman, specified in their articles. In July, 1851, they entered into an agreement with the supervisor and commissioners of highways of the town of Fishkill for the use of a certain highway in the town, according to the provisions of section 26 of the act of May 7, 1847. It is upon this agreement, and its breach, that the present suit is brought. By this contract, these public officers consented and agreed that the defendants should take and use forever "the public highway leading from Fishkill Landing at or near the Hudson River Rail Road bridge, through the Five Corners, Mattewan, Glenham village and Brinckerhoffsville, to the town line, or so much and such parts thereof as the company may require and shall locate their road upon." As the "consideration for this grant, and compensation for the privileges conferred" thereby, the defendants agreed "to keep said road, so occupied and taken by them, with all bridges across which their road shall pass, *in good and sufficient repair according to law, without expense to the town of Fishkill.*" The complaint in the present action, which is brought in the name of the town, pursuant to a resolution of a town meeting, alleges that the defendants neglect to repair the bridge across the Fishkill, near Brinckerhoff's mills and the easternmost portion of the road constructed upon this highway, and also its western termination; that by the travel over and upon it this bridge has become worn and is in need of immediate repairs to the amount of $2000; that the plank upon the road have become worn, displaced and broken, so as to interfere with travel, and that the road also needs repairs to the amount of $2000; that the defendants claim to have abandoned these portions of their road, so that the charge of them has reverted to the public officers, and that the company are no longer liable for their repair, and therefore the defendants refuse to make any such repairs. The judgment which the

plaintiffs claim is to have the contract between the defendants and the town officers annulled, and the defendants expelled from the highway, and forbidden to maintain gates or take toll, and also to have damages. The dispute between the parties, and the evidence taken at the trial, relate almost entirely to the easternmost portion of this road. At the west end the road was constructed chiefly upon a route not occupying the public highway, and whether this portion of the read is properly maintained or has been legally abandoned, are questions in which neither the town in its corporate capacity nor the commissioners of highways have any interest, and which cannot be examined in this suit.

The first defense made by the company is, that the portion of the highway and the bridge about which these allegations are now made—that is, so much of the highway as lies easterly of a point opposite a tenant house of Mr. Brinckerhoff, and just west of the causeway leading to the bridge, which has been mentioned, and with it this bridge in question—have never been occupied and taken by them for the use of their road, and therefore they have never assumed their support. The grant and agreement by the town officers is expressed to be made upon condition that the company should, within thirty days, make and file the map required by law, indicating the location of their road and every portion of the highway required and taken by them. This condition has not been complied with. No map has been filed in the office of the county clerk, nor any survey of the location of this road upon the public highway recorded. The present suit, however, is not brought for the breach of this condition, nor is the failure to comply with this part of the agreement alleged as any part of the cause of action. But this map and survey would have furnished explicit evidence of the extent and limits of the intended appropriation of the highway, and the action of the defendants under this agreement, if they meant to limit it. This evidence it was in the power of the defendants to have furnished, and therefore their own acts, in placing plank and other structures upon the portion of the road in dispute, must be taken more strongly against them. Whatever pre

sumptions would arise from such conduct it was in their power to rebut, and as they have failed to do so, these inferences must be left to have their natural and proper force and effect. It is not denied that the defendants altered and repaired this bridge, and the causeway leading to it, and two culverts over which the causeway passes, and continued their plank track over this portion of the road, with these structures, and to the eastward of the creek. It is said by the counsel for the defendants that this was done by way of constructing a feeder to their road, as they might improve any cross roads on the route, or roads leading to either terminus. But it must be remembered that this point was not the terminus of the road designated by their articles or by this agreement, but that the bridge and piece of road in question are upon the direct route between one designated termination of this plank road and the other, and are a part of the highway for the use and occupation of which they had agreed, or which they had obtained the right to take. When, therefore, they took possession and assumed control of this piece of highway and this bridge, expended labor, laid down plank, and constructed their road upon and over them, in the same manner, in all respects, as they had been doing with the residue of this same road before they reached that point, these public officers had a right to conclude, in the absence of any explicit and legal declaration to the contrary, that the defendants meant to assume and to use this with the residue, and it is too late now for them easily to controvert this conclusion.

It is contended by the defendants, that the inspection of a certain length of their road, extending from the landing to the point opposite the tenant house of Mr. Brinckerhoff, of which I have spoken, and the certificate of the inspectors, under section 34 of the plank road act, furnish the best, if not conclusive, evidence of the entire length of the road, and of the extent of the appropriation of this highway. I do not however understand that this inspection, or the certificate that it has been made, is intended for any such purpose. Its object is only to ascertain the character of a road after it has not only been located, but built and fully completed, and whether it is a good and sub-

stantial road, in conformity with the law, so as to authorize the company to demand tolls for its use. Suppose, after building five miles of their road, which is the shortest distance which the inspectors are permitted to examine and certify, or after building the seven and a half miles included in the present certificate, this company had gone on with their road upon this same highway for one, two or three miles farther, and then stopped without reaching their terminus, there would not seem to be any authority in the statute for a separate inspection of this extension. And yet it would hardly do to say that it was not a portion of the plank road, or that the highway on which it was built had not been taken by the company. If indeed a company see fit to neglect a provision which is intended for their benefit, as well as for that of the public, or if they choose to construct a portion of their road in such a manner that it shall not be fit for inspection, or even to waive the right to take tolls upon such a part of their road, temporarily or otherwise, neither the company nor the public should be prejudiced or affected in any question arising upon the location of the road by any such act or neglect. I shall hold, that for all the purposes of this case, and of this contract, the defendants appropriated this highway as far as they constructed a plank track upon it, or assumed control of it, which I understand, from the evidence, to have been to a point across and on the east side of the creek at Brinckerhoff's mills.

It was urged upon the argument, that the "compensation and damages" for the use and occupation of a highway by a plank road company, which the public officers are authorized by the statute to agree upon, must be wholly estimated and paid in money, and that they have no right to make such an executory agreement as this a part of this compensation. If this position were well taken, the consequences might be at least as fatal to the defense as to the prosecution of this suit. If the commissioners and supervisor have exceeded their authority in making this agreement, the whole proceeding was void, and the company acquired no rights to the highway in dispute. That is the consequence of an unauthorized or illegal attempt to introduce

terms and conditions by rail road appraisers in an assessment of damages. In *Hill* v. *The Mohawk and Hudson R. R. Co.* the supreme court, on certiorari, set aside an appraisal of damages for this reason, and vacated the whole proceedings, and their decision was affirmed, on appeal, by the court of appeals. (3 *Selden*, 152.) The supervisor and commissioners, however, do not occupy the same position as appraisers, nor are their powers restricted within the same limits, as those of the jury authorized by the plank road act to assess the damages when the public officers and the company do not agree. These officers cannot be considered as arbitrators between the company and the owners of land. The privileges which they are authorized to confer are to affect the rights of the public, and they, as the representatives of the public for this purpose, are clothed with authority to do and agree to terms and conditions, for the interests of which they are guardians.

The ground upon which such an appropriation and apparently exclusive use of highways by road companies, have been justified against the owners of the soil over which the highway passes, as well as others, has been that these plank roads still continued to be public highways, and that only the method of maintaining them was changed, and the control vested in the corporation, and the tolls were collected in lieu of a highway tax. (*See Benedict* v. *Goit*, 3 *Barb. S. C. Rep.* 459.) Thus the company became the agents of the commissioners and the public, to oversee, repair and support the road. Such an agreement as the one before me is therefore precisely within the line of their duty and obligation. Whether it creates any new liabilities, and when and in what event a right of action accrues to any party, upon it, are questions which I shall examine in another part of this case. It is sufficient at present to say that this agreement is not void for an excess of authority by the town officers in making it.

The defense which was most strenuously insisted upon at the trial is, that the company have abandoned certain portions of their road, including the strip of highway in question, under authority conferred by and in accordance with the provisions of a special act of the legislature, passed April 15, 1854; and that

their liability has therefore terminated, and the charge and control of this highway has reverted to the commissioners and overseers of highways in the town. Of course this will furnish a complete answer to any such action as the present, if there be no valid objection to this statute, or the proceedings taken in pursuance of its provisions. But the plaintiffs contend that this statute is in conflict with section 16 of article 3 of the constitution of the state, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The object of thus incorporating a rule of legislation into the fundamental law of the state seems to have been twofold. One object undoubtedly must have been to prevent corrupt combinations, by which the supporters of one project might secure the assistance of the friends of a totally distinct object by combining the two in one bill, and thus obtaining a vote for the compound, which neither measure could receive alone. But there was another mischief which it was supposed this provision would remedy. This was misleading the legislature or the people by the title of the law, or concealing the truth as to its nature and extent. In other words, it was intended not only that each law should be confined to one subject, but also that the title of every act should indicate fully and truly its design and extent. It is not contended that this law embraces more than one subject; the question is whether that subject is expressed in its title. The act consists of eight sections. The first releases the company from its obligation under its articles to build and maintain a plank road any farther than the portion of the road which has been inspected and certified according to law. The second section authorizes such an abandonment of any portion of the road already constructed, as the defendants have made of the piece of road in question here, and the next section regulates the terms and conditions and the manner of effecting such abandonment. These two sections are the foundation of the defense now under consideration. The next three sections authorize the company to relay their road with gravel instead of plank, inflict penalties for shunning the toll gates, and authorize three toll gates on the

road, although within three miles of each other. Then follows a section legalizing all the preliminary acts in the organization of the company, the subsequent acts of the company, and of various public officers from time to time in relation to it, and the last section is the usual enactment giving immediate effect to the whole statute. Obviously, upon any reasonable construction of the constitution, there can be no objection to including all these provisions in one law. They all relate to one general subject—the relief of this plank road company, by altering its fundamental articles and modifying its obligations, or in other words, by conferring additional privileges and authorizing the termination of existing liabilities. But the difficulty with the act is that this subject is not expressed in its title. The title is, "An act to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes." These latter words "for other purposes" must be laid out of consideration. They express nothing, and amount to nothing, as a compliance with this constitutional requirement Nothing which the act could not embrace without them can be brought in by their aid. The subject of the first section is fairly expressed in the title. That section relates exclusively to the release of the company from the obligations which they assumed at their organization, to complete a road from Fishkill to Beekman. It was indeed suggested that the words "construct or maintain," which are used in this section, will give to it a scope and effect equivalent to what is contemplated by the residue of the act. In other words, it is said that as the word "construct" refers to the road which the company have not yet constructed or commenced, the word "maintain" should be construed to relate to what the company have built; and thus this section, by releasing the defendants from the obligation to maintain what they have already constructed beyond a certain point, accomplishes at once all which the remaining sections were intended to effect, and justifies this abandonment of a part of the road. If this were so, the first section would be liable to the same constitutional objection which applies to the rest of the statute. But the whole law must be considered together, and

a fair construction of the whole or even of the language of this portion is sufficient, I think, to satisfy us that the word "maintain" relates to the subsequent support of what the defendants have yet to build to comply with their articles, and which the act intends to relieve them from building, and can have no other effect than to make the language broader and stronger, with reference to the existing duties and obligations of the company, in the further prosecution and continuance of their road.

Taking this view of the first section, I see no reason to doubt that so much of the law is unexceptionable and valid. It can hardly, however, be said that "to release the Fishkill and Beekman Plank Road Company from the construction of part of their road," expresses fairly the complex subject of the whole act, including as it does various provisions respecting the company, its privileges and its obligations, some of which have no relation whatever to the construction of any portion of the road. No one would be informed or led to suspect, by the restricted title of this act, that it contained sections conferring upon this corporation some peculiar and extraordinary privileges, or that it was designed to discharge the defendants from liability for their past acts and engagements, and not merely to relieve them from incurring further expenditures and responsibilities in future. It would seem, therefore, that such a statute is in conflict with the spirit and intention, as well as with the letter, of the constitution in this respect. For these reasons, I find myself, with some hesitation and reluctance, constrained to declare the whole of this act, except the first section, unconstitutional and void. The responsibility of pronouncing an act of the legislative power null and void, is one which no court or judge should rashly or readily assume. In this case the application of this provision of the constitution is somewhat technical, and the construction of the fundamental law which I have adopted is, I admit, rigid and precise. But such is the only construction which can give to such a clause any practical effect. The questions which are to arise upon it must resolve themselves into questions of the meaning and construction of words, and such questions must be determined with precision, to be determined with correctness

All the proceedings of the defendants under this law, therefore, to abandon portions of their road and to discharge themselves thereby from a part of their engagements and liabilities, are utterly null and fruitless. The contract between them and the supervisor and commissioners of Fishkill remains in full force as to all its subject matter, and all its obligations are still upon the defendants. It is alleged in the complaint, and substantially admitted by the defense, that since the attempted abandonment pursuant to the provisions of the act which I have been considering, by filing notice of an intention to relinquish certain portions of this road, these portions have become more or less in need of repairs, and the defendants have neglected and refused to repair them, not considering themselves any longer under obligations to do so. This formal abandonment, with the consequent refusal to continue the charge and support of such portions of the road, are set up as causes for the interposition of the court to annul the contract and to remove the plank and toll gates from the highway as unlawful obstructions. I shall at present waive the question whether such an action could be maintained in the name of the town, because I am satisfied that no such consequences can follow from the premises, and no such interposition can be invoked. Whether the defendants' toll gates are legally placed, and lawful tolls exacted, are questions not put in issue in this action. But the neglect to repair a portion of their road, with the consequences which are alleged, more prospective it may be observed than past, is at most but a partial breach of this agreement. It is unquestionably a violation of duty, exposing the delinquents to all the penalties and consequences of such an act. But it is neither by law nor by the agreement of the defendants a forfeiture of their road or their privileges and franchises. I do not see that the rights or the relations of these parties to each other, or of the defendants to the public, are substantially altered by the attempt of the company to do something which they cannot do, or their declaration of an intention no longer to be bound by their agreement, or to discharge their duty. All these questions must be considered and determined as if no statute had been passed and there were nothing in the

case but the contract of July 15, 1851, by which to measure the rights of the parties.

All that remains, then, is the question of a recovery by the town of Fishkill of damages for a breach of this agreement.

I think it admits of great doubt whether such an agreement imposes any new obligations upon a company who take possession as well as charge of a highway under its provisions. Whether any action can be maintained for an omission to repair a part of the road, or a failure to keep it in perfect order, without averring or showing some loss or damage resulting to some party from such omission, beyond the mere inconvenience to the public or to travelers from an unsatisfactory road; whether, in fine, such an agreement can be construed as any thing more than an indemnity to the public and the public officers against any loss or expenditures incurred or cast upon them when they have resumed control of the road, or sooner, if any liability can be made to attach to them, in consequence of the failure of the defendants to do their duty and keep this road in good order as a public highway. Whatever may be the decision of these questions, however, I can see no principle upon which any such claim for damages can be asserted, or any such action as the present maintained, by the town of Fishkill.

Towns in this state come into courts of justice, sue and are sued as corporations. They are vested with corporate capacity for certain specific purposes. (1 *R. S.* 337.) Their whole power and capacity as corporations are derived from and conferred by statute, and these powers are specified and confined to certain functions only. Their authority to contract or assume liabilities is restricted to cases where such action is necessary for the exercise of their appropriate functions as corporations, and their power to sue and be sued must be limited, as it is well stated by Judge Denio, in *Lorillard* v. *The Town of Monroe*, (1 *Kern.* 392,) to cases where the assertion of their corporate rights, or the enforcement of their corporate liabilities, require such proceedings. Now as a corporation a town has nothing to do with, and no interest in, the highways within its limits. The title to the soil of the highways is in individuals. The right to

their use belongs to the inhabitants of the town, not exclusively, but in common with the whole public. The officers who are to control and manage the highways are indeed chosen by the town as a political division, or in its various road districts; but there the power as well as the interest of the towns, as such, completely ceases, and these officers themselves are made a *quasi* corporation for the care and superintendence of highways and bridges. The roads are not the property of the town, nor is the town responsible for their condition or their repair. The lucid opinion of Mr. Justice Selden, in *Morey* v. *The Town of Newfane*, (8 *Barb.* 645,) fully enunciates and discusses this principle, and sustains it by a reference to the cases; and I am not aware that it has ever been denied or overruled, in its application to the towns in our rural counties. And as the town, as such, in its corporate character, has no rights nor responsibilities in respect to public highways for which it can either sue or be sued, so the defendants here are not its agents, or employed by it, in any sense. This agreement was not made with the town, nor was it, as we have seen, to protect the property or the rights, or to save the liabilities, of the town. It could only be as representing the public, whose rights are infringed or whose interests are affected, that the town could interpose in such a case, and that is a capacity in which no authority to appear or act, or sue or defend, is conferred on a town as such by the statute. The interests of the public in respect to highways are committed to the commissioners and overseers, and they are independent public officers chosen, as I have said, in towns as political divisions, but having no concern with towns as corporate bodies. If a recovery could be had upon this agreement by a rule of damages that would give the plaintiffs the amount necessary to put the road in order wherever it is out of repair, of what avail would that be to the interests of the community at large who travel the road, and whose protection would be the only object in permitting such a suit? Or how, after the amount recovered in such an action had been paid into the town treasury, could it be made available to restore the road to usefulness? Where is the right or the power to control its application, or direct its use,

by the town, for such a purpose. In short, the town of Fishkill is not here to protect its corporate property, to assert its corporate rights, or to shield itself from any corporate liabilities. No ground is shown to maintain the present suit, and there must be judgment for the defendants with costs.

This is a case in many respects of the first impression, as far as I am aware, and it involves some principles of very considerable importance. I have therefore bestowed upon all the principal questions a careful examination and discussion. The case might perhaps have been decided without examining all the points which have been presented. But I think the parties are entitled to have the decision of the court upon all the issues fairly involved in the case, and to have that decision distinctly made.

[DUTCHESS SPECIAL TERM, September 8, 1856. *Emott*, Justice.]

NEWELL *vs.* SALMONS and WASHBURN.

22 647
53a 242
59a 539

Where a promissory note was drawn payable with interest from its date, but on one of the makers objecting that it ought not to draw interest until the amount was due, the payee assented and struck out the words "with use," before the note was signed; *Held*, that this was a satisfactory explanation of the alteration, so as to authorize the note to be received in evidence.

The provisions of the revised statutes respecting set-offs, are so far modified by the code as to admit of a set-off or counter-claim, on behalf of one or more of several defendants, where a *several judgment* may be had in the action, between the plaintiff and any one or more of the defendants, as upon a joint and several promissory note

Therefore, in an action upon a promissory note signed by two persons, one as principal, and the other as surety, a set-off of an indebtedness from the plaintiff to the principal may be allowed

In an action upon a promissory note, it is a sufficient ground for excluding evidence that the time for payment of the note had been extended, that no such defense is set up in the answer.

In an action upon a joint and several promissory note, made by two persons, neither of the defendants can be examined as a witness in behalf of the other to prove payment.

Newell *v.* Salmons.

THIS action was brought to recover the amount of a promissory note, alleged to have been executed by the defendants to the plaintiff, bearing date October 1, 1854, for the sum of $1769.86, payable six months after date. The words "with use" had originally been inserted, at the end of the note, but were erased, by lines drawn across them. The cause was heard before H. Gibson, Esq. sole referee. The defendants objected to the note being given in evidence, on the grounds, 1. That no such note was set out in the complaint; that there was a variance between the note offered and that set out. 2. That there appeared to be a material alteration or erasure in the note. 3. That the plaintiff should be required to explain the erasure. The referee overruled the objections, and the defendants' counsel excepted. The execution of the note being proved, the referee permitted the note to be read in evidence. The handwriting of the body of the note was proved to be that of the plaintiff, as well as an indorsement of $1000 received July 3, 1855, which was read in evidence by the defendants' counsel. The defendants further proved, under objections, that the note was given for goods sold by the plaintiff to Salmons, one of the defendants, and that the other defendant, Washburn, signed the note as security for Salmons. The witness who testified to these facts also swore that he was present at the time of the execution of the note. He thought the words "with use" were erased before signing. He mentioned it himself to the plaintiff, and told him it was wrong to have the note on interest. Salmons, one of the defendants, said it should not be on interest, as the purchase of the goods was not, and the plaintiff said "that was right." The defendants then offered to prove that the plaintiff was indebted to Salmons, for goods sold and delivered to the plaintiff, at the time the note became due and at the time of the commencement of this suit, in the sum of $800. This evidence was objected to by the plaintiff's counsel, on the grounds, 1. That it was immaterial. 2. That it was inadmissible. 3. That the set-off offered was in favor of one defendant, and not a joint indebtedness to both defendants. 4. That it was not admissible under the pleadings. And he offered to show, in

connection with this offer, that Washburn signed as surety for Salmons. The referee sustained the objections and overruled the offer, and the defendants' counsel excepted. The defendants then offered to call Washburn in behalf of Salmons, to show that the note had been paid before the commencement of the suit. This was objected to by the plaintiff, 1. As inadmissible. 2. That he was jointly interested with his co-defendant Salmons, or liable with him. 3. That the offer supposed the fact to be true that Salmons was principal and Washburn surety. The referee sustained the objections, and the defendants excepted The same offer was made to call Salmons as a witness, on behalf of Washburn, for the same purpose. The plaintiff objected, and the referee sustained the objection, for the same reason as before, and the defendants excepted. Adolphus Washburn was then called and sworn as a witness on behalf of the defendant Salmons, and was asked if he knew of any money being paid upon the note. This question was objected to by the plaintiff's counsel, 1. As inadmissible. 2. Because the witness was one of the defendants, and the testimony would go to establish a defense, or reduce the indebtedness for which he was jointly interested or liable with his co-defendant Salmons. 3. As inadmissible under the pleadings. The objections were sustained by the referee, and the defendants' counsel excepted. Philander Salmons, the other defendant, was then called and sworn as a witness on behalf of his co-defendant Washburn. He was asked if he knew of any agreement between the plaintiff and himself, after the note was due, to extend the time of payment. This testimony was objected to by the plaintiff as immaterial, for the same reasons as urged against the evidence of Washburn. The referee sustained the objection. The defendants then offered to prove by the witness an extension of the time of payment of the note after it became due, for a consideration moving between the plaintiff and Salmons, and that in the meantime Salmons became insolvent. The offer was made upon the assumption that Washburn signed the note as surety. The plaintiff objected to the testimony for the same reasons, and the defendants' counsel excepted. The referee reported that Wash-

burn signed the note as surety for Salmons, and found in favor of the plaintiff for the balance due upon the note after deducting the indorsement of $1000 with interest, for which, with costs, judgment was rendered against both defendants. The defendants appealed to this court.

P. Jakway, for the plaintiff.

S. P. Pike, for the defendants.

By the Court, C. L. ALLEN, P. J. There is nothing in the objection that the referee erred in receiving the note in evidence without further explanation of the erasure. That erasure was certainly not to the prejudice of the defendants, as its effect was to relieve *them* from the payment of interest for six months and until after the note became due. The note was drawn, at first, on interest from its date, but on the attention of the plaintiff being called to the fact that it was for the purchase of goods not on interest, and on its being insisted by one of the defendants that it ought not to draw interest until it was due, the plaintiff assented, and said that was right, and the words "with use" were then probably stricken out for the benefit of the defendants, and, as the witness thought, before the note was signed. The explanation was full and satisfactory, and the referee so correctly found as a question of fact.

The more serious objection, in my opinion, is, that the referee erred in refusing to receive the evidence of set-off, on the part of Salmons. It is contended, on the part of the plaintiff, that the statute (2 *R. S.* 154, § 12, *sub.* 6) requires that the set-off shall be a demand in favor of all the defendants in the action, and due to them jointly, and so, undoubtedly, is that statute. But it has been insisted, and decided, that under sections 149, 150, 136 and 274 of the code of 1852, this statute is so far modified as to admit of a set-off or counter-claim on behalf of one or more of several defendants, where a *several judgment* may be had in the action between the plaintiff and any one or more of the defendants, as upon a joint and several promissory

note. The case of *Parsons and others* v. *Nash and others*, (8 *How.* 454,) was one almost exactly like the present. Two out of the three defendants had signed the note as sureties for the third. The court allowed a set-off of a judgment in favor of the principal defendant, alone, against the plaintiffs, and judgment was rendered for the defendants. That was a decision at special term, it is true. But the supreme court, in the 6th judicial district, at general term, recognized and affirmed it as good law, in the case of *Briggs* v. *Briggs*, (20 *Barb.* 477.) The court say, the only restriction under the code is, that the set-off must be one existing in favor of a defendant against a plaintiff, between whom a several judgment might be had, in the action. The present action is one of that kind, as was held in the case of *The People* v. *Cram*, (8 *How.* 151.) If these cases are law, and present a true construction of those sections, then the referee should have admitted the evidence offered, of the counter-claim. He seems to have based his decision upon the several grounds urged by the plaintiff's counsel; one of which was, that the counter-claim was inadmissible under the pleadings. If he had placed his exclusion on that ground alone, I think it would not have been sustained. It is true the defendants both claim the set-off as a defense. But it is virtually a claim on the part of the defendant Salmons, and is so set up in the answer, and the claim is there made that it shall operate as a defense for both defendants. That would be a question to be determined by the court after the proof was in. The defense was sufficiently set up, and the plaintiff could not, and did not, pretend that he was taken by surprise by the offer. I think, within the cases cited, the evidence of set-off or counter-claim was proper, and should have been received.

It is said there were no exceptions properly taken to the report, as to the decision of the referee on questions of law. For aught that appears in the case, it seems to have been regularly settled and the exceptions taken in the manner now required in reviewing the report of the referee. And I think we must so intend, for the purposes of this argument.

The defendants were offered as witnesses for each other, and

it was offered to be proved by each that the time for payment of the note had been extended. Several objections were made to the offer; one of which was that no such defense was set up in the pleadings. This, I think, was a sufficient ground for excluding the evidence, and it is not now necessary to inquire whether it would have formed a good defense as to the surety, or not.

The other offer, to prove payment by each of the defendants on behalf of the other, was, I think, properly overruled. The testimony must necessarily have gone for the benefit of the witness, as well as of his co-defendant; as proof of payment would of course have discharged all right of action upon the note.

But, for the reasons stated, the judgment must be reversed, and a new trial ordered; costs to abide the event.

[Clinton General Term, September 9, 1856. *C. L. Allen, Paige, James* and *Rosekrans*, Justices.]

Nickley *vs.* Thomas.

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The principle is well settled, that where a vendor of a chattel is guily of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable, to recover damages.

Thus, where the defendant, upon an exchange of horses with the plaintiff, told him that his horse had *balked* with S. (a former owner) once, but that he whipped him and made him go; but the defendant did not disclose to the plaintiff the fact that he *purchased the horse as a balky horse*, and that his brother and himself had used him *carefully*, as they would use any horse that was balky, while he owned him, and that S. had so used the horse before he sold him to the defendant; *Held*, that this was a fraudulent concealment of material facts, in relation to the defect, which rendered the defendant liable in an action for damages.

It is not enough that a vendor tells the truth in respect to the article sold, as far as he goes. He should tell the whole truth, fully and fairly.

In an action to recover damages for a fraud in an exchange of horses, it is proper to ask a witness what the defendant's horse was worth, at the time of the trade, if kind and not balky.

Nickley *v.* Thomas.

THIS action was orignally brought in a justice's court of Fulton county, to recover damages for an alleged fraud in an exchange of horses. The cause was tried by a jury three times, and on the last trial (the two former juries having disagreed) the plaintiff recovered a verdict for $60 damages, for which, with costs of suit, the justice rendered judgment. The defendant appealed to the county court, which reversed the judgment, on the sole ground that it was against evidence. The only defect complained of, which it was contended the defendant fraudulently concealed from the plaintiff, was that the horse was *balky*. On the trial it was proved that the defendant purchased the horse, and he was put to him, as a balky horse. The witness, who sold him to the defendant, testified that he so put him to the defendant. That he told the defendant he never balked with the witness but *once*, when he whipped him and finally made him go. That he never balked with him but once, but if he took him at all he must take him as a balky horse. The witness had used him, after his refusal to go, as a balky horse. It was also proved that the defendant used the horse, after he got him, in the same manner. The brother of the defendant testified that he and the defendant were in partnership, and used the horse together. The witness said, "I used him carefully, having understood he had balked with Satterly (the former owner.) I used him as I would any horse that I had understood had balked." The defendant told the plaintiff, at the time of the trade, that he had once balked with Satterly, and bothered him, but he made him go, or draw. The plaintiff asked the defendant if the horse was sound and good every way as far as he knew. The defendant said, "he is just as I told you he is, or as I told you he was." A witness was asked the question, "If kind and not balky, what was the horse in question worth, at the time of the trade?" The defendant's counsel objected, on the ground that the witness had not been shown to be a competent judge of the value of horses; that the question called for an improper measure of damages. The court overruled the objection, and the witness answered. It appeared that he had bought and sold horses. and was a judge of their value The

defendant purchased the horse the forepart of August, 1854, and exchanged him with the plaintiff the latter part of the same month. It was clearly proved that the horse was a balky one. The plaintiff appealed from the judgment of the county court.

McFarlan & Adams, for the plaintiff.

Fraser & Stewart, for the defendant.

By the Court, C. L. ALLEN, P. J. The only material question in this case is, whether the defendant was guilty of a fraudulent concealment of facts in relation to the defect complained of, so as to render him liable to the plaintiff, in this action. There can be no doubt of the principle that where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages. (*Fleming* v. *Slocum*, 18 *John.* 403. 1 *East*, 318. 6 *Cowen*, 346, 350. 7 *Wend.* 20.) In *Bench* v. *Sheldon*, (14 *Barb.* 66, 72,) the court say, "In the case of the sale of property the law presumes that the purchaser reposes confidence in the vendor, as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all defects." The county judge in this case remarks, that the defendant communicated to the plaintiff all the knowledge that he had about the defect in the horse; that is, he told him the horse had balked with Satterly once, but that he whipped him and made him go. And that was all the evidence of the defendant's knowledge that he was a balky horse, as he was proved to have worked well and kind while the defendant owned him. It appears to me that the county judge overlooked the circumstance that the defendant did not disclose to the plaintiff the fact that he purchased him as a balky horse, and that his brother and himself had used him *carefully*, as they would any horse that was balky, during the short time that he owned him, and that Satterly had so used him, before he sold

him to the defendant. If these facts had been disclosed they might have prevented the trade, but the defendant would at all events have been exonerated. Merely saying the horse had balked with Satterly *once*, and that he had made him go, was calculated to mislead and probably did mislead him into the belief that the defect did not really exist, as there had only been this one slight evidence of it. There were some other facts connected with the transaction, upon which the jury passed in coming to the conclusion at which they arrived. I think their verdict was final on this question of fact, and should not have been disturbed. It was certainly not *against evidence*, as there were some facts on which to predicate it. The defendant told the truth as far as he went, but he did not tell the whole truth. This he should have done, fully and fairly. There was some *evidence* on which to found the verdict, and it should not be disturbed. (2 *Hill*, 125. 5 *Barb.* 283. 6 *id.* 141.)

The only remaining question for our consideration is, whether the objection to the testimony of the witnesses, as to the damages, was well taken or not. The specific ground of objection was that the witness was not shown to be a competent judge. This was not true in point of fact. It is believed that the legal rule, as heretofore established by abundant cases, was adhered to, and that the evidence was properly received. (23 *Wend.* 353. 4 *Hill*, 625. 2 *id.* 288. 5 *Denio*, 84.)

The judgment of the county court must be reversed, and that of the justice affirmed.

[Clinton General Term, September 9, 1856. *C. L. Allen*, *Paige*, *James* and *Rosekrans*, Justices.]

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4L 267
3h 344
17h 473
19h 526
23a 297

SMITH *vs.* HILL.

A purchaser of goods sold on execution has such an actual or constructive possession as will entitle him to maintain an action against a trespasser.

Where a defendant, on a trial before a justice, omits to raise the objection that there is a lack of the evidence necessary to sustain the plaintiff's case, and it is assumed on such trial, that the proof is complete, this court, on appeal, will hold that it was sufficient.

Where a party forbids the sale of personal property, on execution, upon the sole ground that the property is *exempt* from sale, this will be considered a virtual admission that the execution and sale are *in other respects* legal and valid.

Where, upon a trial before a justice, it is taken for granted that an execution and sale were valid, and the defense is placed upon other grounds, particularly specified, the defendant will not be allowed, on appeal, to change his ground, and rely upon objections to the execution and sale which, if taken at the proper time, might have been obviated.

The claim that property levied on and sold upon execution is *exempt* from execution, is a claim personal to the defendant in the execution; and he, only, can avail himself of the privilege.

An assignee of the judgment debtor, although claiming under a general assignment which does not except exempt property, cannot claim property as exempt from execution, after having stood by at the time of the sale thereof on execution, and made no claim to the property as assignee.

The presumption is that a sheriff, selling property on execution, has done his duty and previously made a levy. And this fact will be considered as admitted, if a party omits to raise the objection on the trial.

Where a sheriff has executions in his hands in favor of different creditors, against the same debtor, whatever is said by either creditor, especially in the presence of the other, at the sale, by way of direction to the sheriff, is proper evidence.

A witness, testifying that he knows a particular stove, and is acquainted with the value of stoves, is within the rule which anthorizes a witness to fix a value upon property.

THIS action was originally brought in a justice's court of Clinton county, to recover the value of a stove and pipe alleged to have been taken by the defendant and converted to his own use. On the trial, the plaintiff proved by A. Shippee, sheriff of the county of Clinton, that in June, 1851, he, as such sheriff, sold all the personal property of Samuel N. Hill, a brother of the defendant, principally upon an execution in favor of the defendant against Samuel; that when it was proposed to sell the stove in question the defendant objected, and said he would

not sell it, as it was exempt property. The plaintiff then told the sheriff to sell it on his execution; that he had such an execution, dated June 2, 1851, and produced one which appeared to have been dated and issued in September, 1851. It recited that one had been previously issued and withdrawn. The witness sold the stove on the plaintiff's execution for $5, the plaintiff being the purchaser; and the amount of the bid was indorsed upon the execution, but not until about the time of the trial. The sheriff, however, testified that the amount was to be credited at the time of the sale, on said execution. He supposed it was indorsed on the execution at the time, but on discovering that it was not, the plaintiff indorsed it, the day the cause was tried. The defendant's counsel asked the witness if Samuel W. Hill was a householder, and a man of family, at the time of sale. The question was objected to, but the court permitted the witness to answer, and he testified that Samuel was a householder, had a family, and lived in the house where the stove was sold, and that it was set up for use at the time of the sale. Another witness testified that he was clerk of the sale, and when the stove was put up and before it was sold, he forbade the sale, on behalf of Samuel W. Hill, as exempt property. S. W. Hill was sick at the time. The witness forbade the sale at the request of the defendant, who appeared to be acting for Samuel at the time. This testimony was objected to by the plaintiff as immaterial, but it was admitted by the court. A witness testified that he knew the stove, and was acquainted with the value of stoves. On being asked the value of this stove, the question was objected to, on the ground that the witness had not shown himself sufficiently qualified to answer. The court overruled the objection, and the witness having described the stove, answered that it was worth $12, with the pipe. The defendant removed the stove some time afterwards, with other property of S. W. Hill. The plaintiff proposed to show by a witness who was present at the sale, that the defendant declined to have the stove sold on his execution, and that the plaintiff then said to the sheriff, in the presence of the defendant, "Do you sell the stove on my execution, and I will indemnify you." And that the

sheriff did accordingly sell it on the plaintiff's execution, and the plaintiff bid it off. This offer, and proof of all that the plaintiff said in the presence of the defendant, to the sheriff, the defendant objected to, on the ground that it was calling for the declarations of the plaintiff to a third person, which were not admissible; and that the testimony was irrelevant and improper. The court overruled the objection, and the witness testified to the facts stated in the offer. The witness further testified that, on the joining of issue in this suit, the defendant said he would not have removed the stove, but that he had spoken to the plaintiff two or three times about taking it away, and he had given him no answer.

The defendant produced the record of an assignment from S. W. Hill to himself, of all the assignor's real and personal property, purporting to bear date the 4th day of June, 1851, and proved, and recorded in the clerk's office of Fulton county on the 5th day of June, 1851. No possession was shown to have been ever taken under this assignment, except by the removal of the stove. The testimony was objected to by the plaintiff, but admitted by the court.

The cause was tried by a jury, who found a verdict for the plaintiff for $12 damages, for which, with costs, the justice on the same day rendered judgment, but did not enter the judgment in his docket until the next day. The county court reversed the judgment of the justice, and the plaintiff appealed to this court.

A. McFarlan, for the plaintiff.

Fraser & Stewart, for the defendant.

By the Court, C. L. ALLEN, P. J. The plaintiff, by the sale, showed himself in the actual or constructive possession of the property in question, and that was sufficient to entitle him to maintain the action, as against the defendant. (8 *John.* 432 11 *id.* 285. 12 *Wend.* 39.) It is objected that no judgment was shown or proved, on which the executions, or either of them,

issued; or when a levy was made; or that the property was ever advertised for sale. None of these objections were taken on the trial, where, if taken, they might have been obviated. On the contrary, it appears to have been then assumed that the executions were valid, and founded on good judgments; and the court, in the absence of all such objections, must so hold. (*See* 21 *Wend.* 305; 10 *id.* 167.) The sheriff testified, without objection, that he sold the stove and pipe on the plaintiff's execution, and that the plaintiff bid it off. The sale, it is true, was forbidden, but upon the sole ground that the stove was *exempt property;* thus virtually admitting the execution and sale to have been, *in other respects*, legal and valid. Besides, it was proved that the defendant himself said, before removing the property, that he should not have done it, but he had spoken to the plaintiff, two or three times, about it, and could get no answer. This was an acknowledgment, as the jury had a right to infer, of possession in the plaintiff. (14 *John.* 126.) And the defendant was not in a condition to avail himself of any irregularities on the part of the sheriff, in making the sale. (*See* 19 *Wend.* 361.) The same remarks are applicable to the objection that the execution produced was not issued until the 16th of September, 1851, and that therefore no sale under it could have taken place in June previous. Some mistake undoubtedly existed in relation to the execution, but it was not required to be explained on the trial, as it undoubtedly might have been, if the attention of the party or the court had been called to it. The sale and execution both seem to have been taken for granted as valid, as already observed, and the defense placed upon the particular grounds taken as specified in the return. The defendant is not at liberty to change his ground, and rely upon objections which, if taken at the proper time, might have been obviated. He took a course on the trial calculated to mislead the justice if he intended to rely upon the ground which he now presents; and the justice might well have supposed that none, other than those urged before him, were intended to be raised. (*Potter* v. *Deyo*, 19 *Wend.* 361, 364.) Whether the stove and pipe were exempt from execution or not, was not a

question proper to be agitated on the trial. That was a claim personal to the defendant in the execution, Samuel W. Hill; and he only could avail himself of the privilege. (*Earl* v. *Camp*, 16 *Wend.* 571. *Mickles* v. *Tousley*, 1 *Cowen*, 114.)

But it is urged that the defendant was the assignee of Samuel W. Hill, and therefore could claim the stove and pipe in that capacity, inasmuch as the assignment did not except property exempt from execution. It may be remarked, in answer to this argument, 1. That no such defense was set up in the answer; and 2. That the defendant stood by at the time of the sale, and made no claim to the property as *assignee*, admitting that the assignment had been made previously to that time He was selling Samuel's property, at the *very time*, under his own execution, and only declined to sell the stove and pipe because it was exempt property, and distinctly stated his objection to the sale, on that ground alone. He cannot now be permitted to change his ground, as before shown. (*See* 1 *Comst.* 496; 3 *Hill*, 215; 6 *id.* 534 *to* 537.) But it did not appear that the assignment was made before the levy, and the jury seems to have found so, as a matter of fact. (*See* 4 *Denio*, 171; 2 *R. S.* 317, § 5; 4 *Comst.* 581 *to* 599.) It is said there is no proof of levy. The presumption is that the sheriff did his duty, and levied before the sale, and so the defendant admitted on the trial, by making no objection. No possession whatever was proved to have been taken, under the assignment—not even a delivery of it or the property; and in my judgment it formed no defense to the action, even if properly admitted in evidence. (6 *Wend.* 581, *and various other cases.*)

But it is contended that the justice erred in allowing the witness to testify to the directions of the plaintiff to the sheriff, in the presence of the defendant, to sell the property in question. It is believed that this testimony was properly received. It was not giving in evidence the declarations of the plaintiff in his own favor. It was a direction (accompanied with an act) at the time of the sale. The defendant had declined to sell the stove and pipe on his execution. The plaintiff then turned to the sheriff, and directed him to sell under his execution, which

was probably younger than the defendant's, and the sheriff did so; the defendant being all the time present, and knowing, therefore, that the plaintiff purchased the property at that time and under what circumstances, and making no objection, at the time, or claim, either under the assignment or under his own execution, but waiving all claims, and estopping himself, thereby, from making them afterwards. The testimony was, in my judgment, eminently proper. The sheriff was acting under the directions of both parties, who had executions in his hands; and what was said by either, especially in the presence of the other, was proper evidence.

Another ground of defense is, that the justice erred in receiving the evidence of the value of the property. I think the witness brought himself within the rule which authorizes a witness to fix a value upon property, and that the evidence was properly received. (5 *Denio*, 84. 23 *Wend.* 353.)

On the whole, the questions were principally of fact, and the finding of the jury, on testimony submitted on both sides, should be conclusive and prevail. (18 *Wend.* 141. 5 *Barb.* 289. 15 *Wend.* 490.)

I can perceive no good reason for disturbing the verdict, and the judgment of the county court must be reversed, and that of the justice affirmed, with costs.

[Clinton General Term, September 9, 1856. *C. L. Allen, Paige James* and *Rosekrans*, Justices.]

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THE BRIDGEWATER AND UTICA PLANK ROAD COMPANY *vs* ROBBINS.

The statute imposing a penalty of $25 upon every person who shall "*forcibly* or *fraudulently*" pass any gate on any turnpike or plank road without having paid the legal toll, is penal, imposing a penalty or forfeiture for the benefit and protection of a private corporation, and in derogation of common right; and is not, therefore, to be extended, by construction, to cases within the mischief intended to be remedied, but which are not within the words of the statute.

The terms "forcibly or fraudulently" in the statute, must be held to have been used in their ordinary sense, and to mean actual force, or actual fraud, as distinguished from constructive force or fraud.

Accordingly, where the defendant, finding a gate, upon a plank road, open, passed through the same with his team, and on being requested to pay toll, declined, saying that he ought not to pay toll, as the road was bad, but would do so if B. said he must; and on another occasion he again passed through the gate, on finding it open, without paying toll, although informed that B. said he must pay toll, no effort being made, by word or deed, on either occasion, to stop him; *it was held* that this did not amount to a forcible or fraudulent passing of the gate, so as to subject the defendant to the penalty.

THIS was an appeal by the defendant from a judgment of the Oneida county court. The action was brought before a justice of the peace, to recover a penalty of $25 for forcibly and fraudulently passing a toll gate upon the plaintiffs' road, without paying the legal toll. The complaint contained but one count, and set forth that on the 29th day of May, 1855 the defendant forcibly and fraudulently passed the plaintiffs' gate, without paying toll, and demanded a judgment for $25 and costs. It was proved that the gate in question was kept by a young woman; that it was usual to leave the gate open during the day; that on the 29th of May the defendant drove his team up to the gate on a trot, and passed through, without stopping, it being open; that the gate keeper told him Mr. Bushnell (the superintendent of the road) said he must pay toll, but the defendant passed on without paying toll; that four days previously the defendant had passed the gate in a similar manner, and on toll being demanded, said that he ought not to pay toll, as the road was so bad, but that he

would pay if Mr. Bushnell said he must. The justice rendered a judgment for the plaintiff for $25 and costs, and on appeal the county court affirmed the judgment.

R. R. Morehouse, for the appellant. I. The court erred in admitting evidence of what occurred on the 25th of May. The object of the evidence, as stated, did not render it competent or material.

II. The practice of the witness Lines, in reference to keeping the gate open or shut, and also her reasons for closing it on certain occasions, were wholly irrelevant and immaterial, and should not have been admitted.

III. The court should have nonsuited the plaintiff. The case, as proved, showed neither force nor fraud. The defendant passed through the gate, which was open at the time, quietly, without any violence, and upon the evidence there can be no allegation of fraud. (*President and Directors of the Columbia Turnpike* v. *Woodworth*, 2 *Caines*, 97.) See section 9 of the Rensselaer and Columbia turnpike act, (*Sess. Laws of* 1807, *vol.* 2, *p.* 407,) which is precisely similar to the act declared on. Force is defined to be strength—compulsory power. In law, force is defined to be an offense by which violence is used to persons and things. Force is now generally used in a bad sense, to denote unlawful violence, (*vis injusta.*) Bracton defines force (*vis*) to be the onset or pressure of a greater thing, which cannot be resisted. Regularly, a forcible entry must be with a strong hand, with criminal weapons, or with menace of life and limb. It must be accompanied with circumstances of actual violence or terror, and an entry which has no other force than such as is implied by law in every trespass is not within the statutes. (*Bac. Abr. For. Ent. Dalt.* 300. 1 *Haw. Ch.* 64, § 25. *Comyn's Digest*, *vol* 4, *p.* 354.) An indictment for forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force as is calculated to prevent any resistance. (*Rex* v. *Smith*, 5 *Car. & P.* 201. 1 *M. & Rob.* 156. *Willard* v. *Warren*, 17 *Wend.* 257. *People* v. *Rickert*, 8 *Cow.* 226, *Cowen, J.*) "To constitute a forci le

entry, there must be personal violence, or threat of personal violence. In all cases there must be something beyond a mere trespass upon the property."

IV. If the defendant was guilty of any offense, it was under the act of 1855, and not under the revised statutes. The section under which this action was brought is repealed by the act of 1855. (*Sess. Laws of* 1855, *p.* 875. 16 *Barb.* 15.) A subsequent statute, repugnant to a prior one, repeals it; and it is laid down in *Davis* v. *Fairbanks*, (3 *How. U. S. Rep.* 636,) that if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the prior one. Under this rule the 57th section of the turnpike act, so far as it applies to plank roads, is repealed.

V. The court erred in submitting the question of force or fraud to the jury, because, (1.) There was no evidence of either force or fraud for the jury to pass upon. (2.) There was no conflicting evidence as to what occurred on the 29th of May. It was a question of law merely. (3.) The evidence, taken together, only shows that the defendant passed the gate without paying toll, giving his reasons for so doing. That no force was used or attempted, and the jury were instructed that they might find either force or fraud, or both, without any evidence of either. (4.) The jury were instructed, in substance, that they might infer fraud on the part of the defendant, without any evidence that would legally warrant such inference. (5.) The charge was clearly erroneous, as it was against law, and not warranted by the facts proved. (6 *Hill*, 326.)

VI. The verdict of the jury was against the law, and was not supported by the evidence. The judgment should therefore be reversed. (2 *Caines*, 97. 17 *Wend.* 264. *Session Laws of* 1855, *p.* 875.)

Doolittle & Hurlburt, for the respondent. I. The defendant confessedly passed the gate without permission and without paying the toll, and when he knew the payment of the toll was a

condition precedent to his right of passing, and in defiance of the gate keeper's demand of the toll. When a person refuses to comply with the condition imposed to his passing, and passes, he can only be stopped by force.

II. The defendant, within the meaning of the section of the statute in that behalf, forcibly passed the gate without paying toll. Forcibly passing the gate, is passing without permission, and under such circumstances as to give the person tending the gate to understand that he will use force to overcome resistance to his passage, or with such comparative power and strength, or under such circumstances, as to intimidate the person tending the gate from manual resistance, or under such circumstances as would give the gate keeper to understand that force would be required to prevent his passing. (8 *Cowen*, 229. *Id.* 232. 12 *John.* 408. 17 *Wend.* 264.)

III. The defendant fraudulently passed the toll gate without having paid the legal toll. (1.) An actual or positive fraud is the intentional and successful employment of any cunning, deception or artifice, used to circumvent, cheat or deceive another. (1 *Bouvier's Law Dic.* 590. 1 *Story's Eq.* § 186.) Constructive frauds are such acts as are either against public policy, in violation of some special trust or confidence, or operate substantially as a fraud upon private rights, interests, duties, or intentions of third persons; or unconscientiously compromit, or injuriously affect, the private interests, rights or duties of the parties themselves. (1 *Story's Eq. Jur. ch.* 7, §§ 258 *to* 440.) (2.) Getting through on the statement that he would pay if Bushnell said so, when he did not design to do so, was deception. (3.) Giving the gate keeper to understand that he would pay next time, if Bushnell said he must, and thus preventing her from shutting the gate on him, and allowing him to get so far along that she could not stop him, when she knew he intended to pass without payment, was tricky, deceptive conduct, and cheating her out of toll. (4.) The defendant used the road when the plaintiff had no one to guard it who could resist him, with intent not to pay for it. He appropriated to his own use the property of the plaintiff, intending to avoid payment and

elude the gate by false pretenses, or by setting at defiance the demands of the gate keeper, by passing through the gate by one artifice or another without payment—acts all injuriously affecting the private interests of the plaintiff.

IV. Whether the passage of the gate was forcible and fraudulent, or either, was a question of fact for the jury, and they have found for the plaintiff, and therefore the judgment will not be disturbed.

V. There was no question made on the trial, that the act of 1855 repealed the section of the statute which imposes the penalty recovered, and it cannot now be made, for that reason. (*Willard* v. *Bridge*, 4 *Barb.* 361, 363.) (1.) The defendant moved for a nonsuit, but it was only on the ground that there was no evidence to show that the defendant forcibly or fraudulently passed the gate. (2.) He passed the gate when prohibited at the time from passing, without payment of toll. The gate itself was notice of the condition. The gate keeper demanded it. That demand, in such cases, is clearly a demand of payment as a condition to going through. It is saying, "Sir, you must pay the toll before you can pass." (3.) The refusal to pay, under the circumstances, and driving through, is saying, more potently than by words, I shan't pay, and if you stop me from going through, you must do it by force, and urges his horses to drag him through. This would be forcibly passing, no matter who tended the gate. (4.) What would not be intimidation or force under one set of circumstances, would be under other circumstances.

VI. The act of 1855 does not purport to, and does not, repeal § 55, 1 *R. S.* 719. It does not profess to provide a penalty for *forcibly* or *fraudently* passing a gate. (1.) It provides for a case § 55 did not provide for, *i. e.* a case where there was no force, &c. (2.) A large penalty was designed to be given when there was force or fraud. (3.) It will be seen that the whole act of 1855 was designed to make certain acts penal, not before such, and to repeal any provision of law authorizing any such acts.

VII. The exception to the justice's charge points out no par-

ticular ruling excepted to, and is therefore too general to be available for any purpose. He submitted the question of force or fraud to the jury. And on what was necessary to constitute force, his charge was particularly sound and clear, and is sustained alike by common sense and authority. (8 *Cowen*, 229 *and* 232.)

By the Court, W. F. Allen, J. The evidence of the gate keeper of the plaintiffs showed that on the 25th of May, 1855, the defendant passed through the gate on the plaintiffs' road, near Bridgewater, and on being requested to pay toll, declined, saying that he ought not to pay toll as the road was bad, but would do so if Mr. Bushnell said he must. On the 29th of May he again passed through, and was told that Mr. Bushnell said he must pay toll; to which, so far as appears, no reply was made, but the defendant passed on without paying toll. On each occasion the gate was open, as it was habitually in the day time, and was not opened by him or any one else to admit of his passage. By law a penalty of $25 is imposed upon every person who shall "forcibly or fraudulently pass any gate on any turnpike or plank road, without having paid the legal toll." The statute imposing this penalty was originally enacted in reference to, and for the benefit of, turnpike corporations, and was by a subsequent act made applicable to plank road companies formed under the general act of 1847. (1 *R. S.* 588, § 57. *Laws of* 1849, *p.* 375, § 5.) The act is penal, imposing a penalty or forfeiture for the benefit and protection of a private corporation and in derogation of common right, and may not, therefore, be extended by construction to cases within the mischief intended to be remedied, but which are not within the words of the statute. The act which subjects an individual to the penalty must be both within the letter and the spirit of the act imposing it; that is, the offense must be clearly and specially described in the statute. While in the construction of penal as of other statutes, the intention of the legislature must govern, that intention is to be collected from the words employed, and the words must receive an interpretation according to their plain and natural

sense—the sense in which they are ordinarily used. (*The United States* v. *Wiltberger*, 5 *Wheat.* 76.) The question before us is, whether there was any evidence to be submitted to and passed upon by the jury, of a "forcible or fraudulent passing" of the gate of the plaintiff, within the statute imposing the penalty. The terms "forcible and fraudulent" must be held to have been used in their ordinary sense. Actual force or actual fraud, as distinguished from constructive force or fraud, was intended. Every passage without the consent of the toll gatherer, and without the payment of the legal toll, would be in one sense forcible, as being done against his will, and fraudulent, as an act in fraud of the rights of the company; but it cannot be presumed that these very common and well understood words were used in this somewhat refined and very unusual sense. The words were designed to specify the particular wrongful passing, without the payment of toll, which should subject an individual to the penalty. Upon any other construction the words were useless, as qualifying the sentence and limiting the penalty to a particular class of offenders.

The act of the defendant was rather a non-feasance than a malfeasance. It consisted in an omission to pay the toll. Indeed he was not forbidden to pass the gate, and no effort was made, even by words, to prevent his passing until he should pay the toll; and a mere non-feasance cannot be considered as forcible. In general, by force is understood unlawful violence; but acts may be forcible which are perpetrated by means of actual violence, or threats of personal injury to another. (*Coke Lit.* 161, *b.* 3 *Thomas' Coke*, 543, 4. *People* v. *Rickert*, 8 *Cowen*, 226. *Willard* v. *Warren*, 17 *Wend.* 257.) This point is decided by *The Columbia Turnpike* v. *Woodworth*, (2 *Caines*, 97,) in which it was held that a similar clause in the act incorporating the company had in contemplation only forcible and violent passages, and that simply riding through a gate, without paying toll, did not subject the party to the penalty. There is no pretense that the defendant used any trick, artifice or cunning to secure an opportunity of passing the gate, or that he took any measures to circumvent, cheat or deceive the agent of

the plaintiff in charge of the gate. He found the gate open and rode through, and no effort was made by word or deed to stop him. It was true he was asked to pay toll, and did not comply with the request, and was thereby guilty of that constructive and very technical fraud of which every person is, in contemplation of the law, guilty who voluntarily refuses to perform his legal duties. He is liable to an action for the non-performance, but cannot in all cases be convicted of an assault and battery, or charged with having committed an act *vi et armis*, or punished as a cheat, or charged with an actual fraud. We have a legislative construction of the statute under review, in the act of 1855, (*Sess. Laws*, *p.* 874, § 3,) by which a penalty of ten dollars is imposed upon any person who shall pass any turnpike or plank road gate without paying the toll required by law, and with the intent to avoid the payment thereof. This was designed to remedy an omission in the former act and provide for cases not within its letter or spirit, and imposed a lesser penalty for an offense less aggravated in its character than those before provided for, and this act would not have been necessary if the statute, under which this action is prosecuted, will bear the construction claimed for it. Under the act of 1855 the defendant can be convicted, if the intent to avoid the payment of toll can be fixed upon him. But there was no evidence of a forcible or fraudulent passing of the gate, and the judgment of the county court and of the justice must therefore be reversed.

[Onondaga General Term, October 7, 1856. *Pratt, Bacon* and *W. F. Allen*, Justices.]

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NIPPER *vs.* GROESBECK.

Where both the subscribing witnesses to a will testified that they saw the testatrix sign the will, and that they became subscribing witnesses at her request; and one of them stated that a short time before the testatrix signed it, it had been put into her hands to read; that she read it, and then requested some one else to read it; and that S. then read it aloud, in the presence of the testatrix and the witnesses; that about an hour afterwards the testatrix requested to have the will brought, that she might sign it, and on its being brought she signed it, the subscribing witnesses attaching their signatures, upon her suggestion and at her request; and the other subscribing witness testified that after the reading of the will, the testatrix said "bring me the will, and I will write my name;" that after her signature had been completed, and those of the attesting witnesses had been attached, she declared she was glad it was done with and off her mind; and the will was thereupon folded up and handed to G. for safe keeping; *Held*, that this was a valid publication and execution of the will.

THIS was an appeal by George Nipper, from a decree of the surrogate of the county of Oswego, admitting the will of Mary M. Nipper, deceased, to probate. The material facts appear in the opinion of the court.

R. H. Tyler, for the appellant.

D. H. Marsh, for the respondent.

By the Court, BACON, J. The requisites to the due execution of a will, in this state, as prescribed by the statute, (2 *R. S.* 124, § 32, 3*d ed.*) are very familiar, and are in substance, 1st. A subscription by the testator at the end of the will; 2d. The making or acknowledgment of such subscription in the presence of the attesting witnesses; 3d. A declaration by the testator, at the time of subscription or acknowledgment, that the instrument is his will; and 4th. The signatures of two attesting witnesses, at the testator's request. It will not be doubted, I think, that all these requisitions have been complied with in the case before us; unless it be the third, which requires what is technically known as the publication of the will; and that is the only important question in this case. If the will has been

substantially published, it was properly admitted to probate. If not, the order of the surrogate must be reversed, and the will of the testator must be set aside. This result should not follow unless there has been so great a departure from the provisions of the statute, that public policy requires it to be upheld even to the letter, and the expressed wishes of the testator defeated.

In respect to what shall be deemed a sufficient publication, the late chancellor of this state, in *Brinckerhoof* v. *Remsen*, (8 *Paige*, 599,) lays down the rule that no particular form of words is necessary, under the provision of the statute, to communicate the information by the testator that he understands the nature of the instrument he is executing, and intends to recognize it as his will. The important and the only important thing is that the testator understands, and the witnesses know, that the instrument is executed as a will. The same doctrine is reiterated in the above case in the court of errors, to which it was taken by appeal. (26 *Wend.* 325.) The chief justice, in his opinion, states emphatically, "I agree that no form of words will be necessary—that the legislature only meant that there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will. *Any communication of this idea, or to this effect*, will meet the object of the statute." So in *Seguine* v. *Seguine*, (2 *Barb. S. C. R.* 385,) Edmonds, J. speaking of the publication says, the object of the statute was to secure evidence that a testator, when he executed the instrument, knew that it was a will, and not an indenture or deed of a different character. And in *Torry* v. *Bowen*, (15 *Barb.* 304,) the court say, "It is agreed, and so are the cases, that the declaration need not be in the exact words of the statute, but that words equivalent in import and signification, or acts and words together which amount to a clear and unequivocal declaration by the testator of his intention to execute the instrument as his last will and testament, will be sufficient." In that case all the testator did was to sign the will in the presence of the witnesses, and pointing to the signature and seal declare that to be his hand and seal, for the uses and purposes

therein expressed. When asked by a third person to explain the instrument, he replied that the paper explained itself, and took no more part in the execution. A witness testified that he read the attestation clause to the witnesses, although neither of the subscribing witnesses was able to recall this fact, or to state that the testator mentioned the word "will" at any time during the execution. And yet the court held that there could be no doubt that the witnesses knew the instrument was executed as a will, by the testator, and this was sufficient evidence of publication.

In the case of *Lewis* v. *Lewis*, (1 *Kern.* 220,) which is claimed as a decisive authority on the point of the alleged insufficient publication of the will in the case before us, it appears that the will was not signed in the presence of the witnesses, and when they subscribed as attesting witnesses it was so folded that they could not see the signature, and the only acknowledgment or declaration by the testator was, "I declare the within to be my will and deed." This the court very properly held to be an insufficient execution. As the instrument was not seen by the witnesses, they could not identify it as a will, and the declaration of the testator was equivocal and did not necessarily inform the witnesses that it was a will. The same expression would have equally well applied to, and might be well understood as, the acknowledgment of a deed, or any sealed indenture.

In the light of these adjudged cases, and the principle to be extracted from them, it seems to me it cannot be doubted that there was such an execution of the will, in this case, as satisfies all the requirements of the statutes. Both the subscribing witnesses testify that they saw the testatrix sign the will, and that they become subscribing witnesses at her request. Mrs. Groesbeck states that a short time before the testatrix signed it, it had been put into her hands to read; that she read it and then requested some one else to read it; and that a Mrs. Sprague then read the will aloud, and both witnesses were then present. In about an hour afterwards, she requested to have the will brought that she might sign it, and it was accordingly

brought, and she signed it, the subscribing witnesses attaching their signatures, upon her suggestion and at her request. The other witness, Miss Follett, is still more explicit, stating that when the preparations were made for its execution, after it had been read by the testatrix and again by Mrs. Sprague, the testatrix said, "bring me the will, and I will write my name." After her signature had been completed, and those of the attesting witnesses had been attached, she declared she was glad it was done with and off her mind, and the will was thereupon folded up and handed to Miss Groesbeck, who retained it until it was offered for probate. In the light of this testimony, which is all there is in the case on the subject of the publication and the circumstances attending the execution, it cannot be questioned, I think, that the testatrix was entirely aware of the character of the instrument; that she knew she was executing a will, and designed the parties attesting it to be apprised of her act, and, substantially in compliance with the statute, made a declaration of such intent and act. That they knew it to be a will, and subscribed under such knowledge and with a view to certify to the fact that it was the will and testament of the testatrix, admits of no debate.

There was then, in my judgment, a good and sufficient execution and publication of the will in question; and although I agree with my brother ALLEN, that the statute on the subject of the proper execution of wills is a beneficent and wise statute, and its provisions should be adhered to, yet I cannot think it so essential to maintain the strict letter of the law as to lose sight of its spirit, nor that the deliberate will of a testator should be frustrated by an obstinate adherence to a prescribed formula, when the substance and essence of the provision have been fairly complied with.

The order appealed from must accordingly be affirmed.

[ONONDAGA GENERAL TERM, October 7, 1856. *Pratt, Bacon* and *W. F. Allen*, Justices.]

INDEX.

A

ACTION.

1. Where gravel was given to the public, by the plaintiff, and was delivered to and applied by the defendant as overseer of highways, in repairing the road; *Held*, that no action would lie against the defendant for the value. *Syron* v. *Blakeman*, 336

2. The defendant, who was sheriff of Erie county, by public advertisement, on the 24th of December, 1852, offered a reward of $250 for the discovery and apprehension of the person or persons who murdered J. B. The plaintiff, a constable, on the 18th of January, 1853, arrested one F. without warrant, believing him to be the murderer, and took him to the jail of Erie county. F. was subsequently tried for the offense, and was convicted and executed. In November, 1853, the plaintiff, at the request of the defendant, made application to the board of supervisors of Erie county to raise the amount of the reward and to pay the same to him. One M. claimed a part of the reward, and he and the plaintiff appeared before the board and were heard upon their claims. The board allowed the plaintiff $150 and M. $100. An order for $150 was given to the plaintiff, who took it, and received the money from the treasurer, at the same time claiming however, that he was entitled to the whole amount of the reward, and protesting that he did not receive the $150 in full of his claim. M. received the $100 awarded to him. In an action against the sheriff, to recover the amount of the reward; *it was held* that the plaintiff and M. having referred their respective claims to the board of supervisors, and consented that the board should settle their respective rights to the reward, and the board having settled those rights, and the plaintiff having received the amount to which by the decision he was entitled, he had no further claim against the defendant. *Prentiss* v. *Farnham*, 519

3. Where an individual sets fire to his fallow, wood and timber, for the purpose of bringing the land into cultivation, and the wind rises, and causes the flames to spread, and communicate the fire to his neighbor's land, and the crops and grass of the latter are injured and destroyed, no action will lie, without some proof of negligence or misconduct on the part of the person building the fire. *Stuart* v. *Hawley*, 619

4. Such negligence or misconduct must be established, by legal evidence. The mere fact that the fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, will not be sufficient to entitle the party injured, to recover. *ib*

See ASSIGNMENT.
BANKS.
COMMON SCHOOLS, 4.
WATER.

AGREEMENT.

1. By a written agreement, between P. of the first part and A. & H. of the

second part, P. agreed to cut 50,000 pine logs from townships 22 and 25 in F. county, and to deliver them to A. & H. on certain lakes and ponds, and on the Racket river, and to drive them down such river to the saw mill pond of P., and to saw out such logs for A. & H. In consideration whereof A. & H. agreed to pay and advance to P., at the execution of the agreement, $3000, and thereafter, at different times, in the whole, 50 cents for each log driven into said pond; and also the further sum of $1.25 for every 1000 feet of boards and lumber sawed by P. A. & H. were to retain 10 cents so to be advanced, for each log, until the deduction should amount to the $3000 so advanced by them to P.; and all payments and advances were to be made by A. & H. in the bills of the Bank of C., so long as said bank continued to redeem in Boston or New York; and P. was to exchange such bills for funds current in Boston or New York, after they had been returned to the bank and were presented to him, &c. A. & H. were to use their best skill in selling the lumber at the highest prices, &c., and all proceeds of the sales were to be applied, in the first instance, towards repayment of all advances of A. & H., with interest, and of the expenses of the sale; and the balance was to be paid by A. & H. to the bank of C. upon P.'s prior indebtedness to that bank A. & H. also agreed to bestow their time and services in the business, either in measuring the logs, &c. or in the sale of the lumber, for which they were to be paid by P. $1000 each for the year, &c. Concurrently with this agreement P. conveyed to A. & H. his interest in said townships 22 and 25, being about 4000 acres of timber lands, from which the 50,000 pine logs were to be cut. *Held*, that this transaction was not in form an agreement for a loan of money. And A. & H. having denied, in their answers, that P. applied to them for a loan of money, or that they agreed o. proposed to loan him any money, and that denial being confirmed by the affidavits of three witnesses who were present during the negotiation and at the execution of the agreement; *it was further held*, that the agreement was not void as being for the loan or forbearance of money, within the meaning of the statute of usury. *Pomeroy* v. *Ainsworth*, 118

2. And it appearing from the pleadings and affidavits that the agreement was negotiated, made and executed in Vermont, where A. & H. resided, and where the Bank of C. was located; that $3000 was advanced to P. by A. & H. in that state; that at the time of the execution of the agreement it was intended that the lumber, or the greater portion thereof, should be sent to Boston, and other places in New England, for market; that it was intended and understood by the parties that the interest which A. & H. would receive, if any, for their advances, under the agreement, should be computed according to the laws of Vermont, at the rate of six per cent per annum, *it was also held*, that the agreement, at least so far as respected the amount of interest to be paid to A. & H. for their advances to P., was made in reference to the laws of Vermont, which must govern its construction, and determine its validity. That such agreement must be presumed to be legal, by the laws of that state, inasmuch as the contrary had not been shown. And if legal by the laws of Vermont, that it was protected from the operation of the usury laws of this state. *ib*

3. *Held further*, that the agreement being silent as to the place where the advances made by A. & H. were to be repaid, such advances were to be repaid to them in Vermont, that being their place of residence. *ib*

4. As a general rule, the law of the place where contracts purely personal are made must govern as to their construction and validity, unless they are to be performed in another state or country, and were made in reference to the laws of such state or country, in which case their construction and validity depend upon the law of the place of performance. *ib*

5. If no place of performance is expressly stated, or implied from the terms of the contract, the law of the place where it was made will govern. *ib*

6. If a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed. *ib*

7. A party alleging that an agreement is invalid, under the usury laws of

another state, must show what are the laws of that state in relation to usury. In the absence of such proof, the presumption is that the agreement is valid, under those laws. *ib*

8. A written contract, in the absence of fraud, can only be reformed, where it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake. *Wemple* v. *Stewart*, 154

9. To show that a written contract does not conform to the actual agreement made and intended to have been reduced to writing, the actual agreement should be stated, and the mistake in reducing it to writing alleged. *ib*

10. By a written agreement between the defendants and G. & V. the former sold and agreed to deliver to the latter 30,000 spruce plank "*sawed at our mill in S.*" *Held*, that the words "sawed at our mill," amounted to an affirmation by the defendants that that quantity had been sawed at their mill, and were then in their possession, owned by them. And that if the defendants had not on hand, at the date of the contract, 30,000 plank, they were bound to saw a number equal to the deficiency, and deliver them according to their contract. *ib*

11. The defendants, in the same contract, also agreed to deliver to G. & V., in addition to the said 30,000 plank, all the merchantable plank, of the description and proportions therein mentioned, as they, the defendants, might saw at their mill the ensuing winter, to be delivered at the yard of G. & V. in F. the ensuing summer and winter, &c. *Held*, that the defendants did not, by this clause, obligate themselves to saw any spruce plank at their mill. That the obligation extended no further than to require them, in case they should elect to saw merchantable spruce plank at their mill, during the ensuing winter, to deliver all such plank, so sawed, at the yard of G. & V. *ib*

12. It was accordingly *held*, that it was erroneous to allow damages to the plaintiffs for the non-delivery of merchantable spruce plank of the description specified in the contract, not actually sawed at the mill of the defendants during the winter ensuing the date of the contract. *ib*

13. Where a party to a contract, after a breach by the other party has occurred, assigns his property to trustees, in trust for the benefit of creditors, the omission of the assignees to give notice to the other party, of the assignment, and to offer to fulfill the contract on the part of the assignor, will not discharge the other party from his obligation to fulfill the contract on his part. *ib*

14. The defendants having a claim against the United States government, for the refunding of duties erroneously collected of them, upon molasses and sugars imported by them, the plaintiff proposed to recover and cause any excess of duties so paid, to be refunded, upon his receiving for his services and expenses one half of the same, or, at the option of the claimants, a reasonable compensation to be afterwards agreed upon; he agreeing to save the defendants harmless "from all costs and liabilities to costs," and to charge his commission only "on whatever sum or sums of money he might recover for them." The defendants, among others, agreeing to the plaintiff's proposal, they signed a stipulation to that effect, writing opposite to their signatures, however, the words "not to interfere with any other arrangement already made." The defendants had previously employed D. & O. to prosecute the same claim, who were then actually engaged in the business, and whose influence and exertions contributed largely to the result. The claim having been allowed, and a large sum of money refunded to the defendants; *Held*, that the plaintiff was not entitled to recover fifty per cent upon the amount refunded by the treasury, with interest and without deduction; and that it was erroneous to charge the jury that, in fixing the defendants' liability, they were not to take into account the amount paid by the defendants to D. & O. who were previously employed to prosecute the claim. *Ely* v. *Spofford*, 231

15 Contracts must always be construed in reference to the subject matter to

which they relate, and in the light of the contemporaneous facts and circumstances. Evidence of the extrinsic circumstances existing at the time is therefore always admissible, not to contradict the written agreement, but to aid in its interpretation. *Phelps* v. *Bostwick*, 314

16. Where a vendor, at the time of making a contract for the sale of land, agrees verbally to give the purchaser security for the payment of a judgment which is a lien upon the premises, but that stipulation is not inserted in the written agreement, and subsequently, third persons, as sureties of the vendor, in fulfillment of the verbal undertaking, execute an instrument by which they agree to pay the judgment, such instrument will be held to be given upon a sufficient consideration; it being supported by the consideraton of the principal agreement. *Cady* v. *Allen*, 388

See DAMAGES.
VENDOR AND PURCHASER.

ALTERATION OF INSTRUMENTS.

Where a promissory note was drawn payable with interest from its date, but on one of the makers objecting that it ought not to draw interest until the amount was due, the payee assented and struck out the words "with use," before the note was signed; *Held*, that this was a satisfactory explanation of the alteration, so as to authorize the note to be received in evidence. *Newell* v. *Salmons*, 647

AMENDMENT.

1. The provisions of the code, respecting amendments, are in addition to those in the revised statutes. They are not inconsistent with each other, and both remain in force. *Perry* v. *Tynen*, 317

2. Amendments are now granted with greater liberality than formerly. Under the provisions of the revised statutes and the code, whenever the court can see that justice would be furthered by an amendment of the pleadings and proceedings in an action, it should grant the amendment, if asked for, upon terms just to the opposite party. *Harrington* v. *Slade*, 151

3. It is in all cases proper, however, in order to prevent negligence and laxity in pleading, to require of the party asking the amendment some reasonable excuse for the defect in his pleading, which he seeks to correct. *ib*

See JUSTICES' COURTS, 5, 6.

APPEAL.

1. An order allowing a defendant to put in a supplemental answer, setting up a new defense, which, if established, will be fatal to the plaintiff's action, involves the merits, or at least affects a substantial right, and is therefore appealable. *Harrington* v. *Slade*, 161

2. The right of appeal from the marine court of the city of New York to the common pleas was not taken away by the act of July 21, 1853, in relation to the marine court. *The People ex rel. Debenetti* v. *Gale*, 502

3. But such an appeal can only be resorted to after an actual determination has been made by the marine court at a general term. WHITING, J. dissented. *ib*

4. An appeal does not lie to the common pleas from a judgment rendered by a single judge of the marine court. If such an appeal is taken, it will confer no jurisdiction upon the common pleas; and the judgment of the marine court at special term being thus left in full force, it is the duty of the clerk, when applied to, to issue execution upon it. *ib*

5. Where, upon a trial before a justice, it is taken for granted that an execution and sale were valid, and the defense is placed upon other grounds, particularly specified, the defendant will not be allowed, on appeal, to change his ground, and rely upon objections to the execution and sale which, if taken at the proper time, might have been obviated. *Smith* v. *Hill*, 650

ASSAULT AND BATTERY.

See JUSTICES' COURTS, 1.

ASSIGNMENT.

B. having agreed to make a wagon for M., the latter gave to L. a written order upon B. for such wagon, which order B. accepted and handed back to L. The wagon was afterwards delivered to L. by B. upon the order. *Held*, that this was an equitable assignment of the wagon to L., and that B. could not recede from the undertaking, and maintain an action against L. for the price of the wagon. *Barber* v. *Lyon*, 622

ASSIGNOR AND ASSIGNEE.

1. Since the code, an assignee takes precisely the same interest, on the assignment of every species of demand, either at law or in equity, as he did before. *Butler* v. *N. Y. and Erie Rail Road Co.* 110

2. Hence if the demand is such as was capable of assignment before the code was adopted, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment, so as to give the assignee a right of action thereon. *ib*

3. Claims for mere personal torts, which die with the person—such as slander, assault and battery, false imprisonment, crim. con., seduction and the like—are not assignable; but claims for taking and converting personal property, or for injury to personal property, and it seems, generally, all such rights of action for a tort as would survive to the personal representatives of the party, may be assigned, so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code, as he formerly might do in the name of the assignor, at law. *ib*

See WAGERS.
WITNESS, 2.

ATTORNEY.

See JUSTICES' COURTS, 2, 3.

B

BAILMENT.

A bailee or depositary is not liable to an action until demand and refusal. Therefore, where money has been left with another in naked deposit for the benefit of the owner, the latter cannot maintain an action to recover it, until a demand has been made upon the depositary, to restore it, and he has refused to do so. *Phelps* v. *Bostwick*, 314

BANKS.

1. Where the payee of a note which is made payable at a bank, indorses the same and deposits it with the bank for collection, the bank becomes the agent of the payee, and not of the maker; and after the note has been paid, no omission, or misapplication of the money, by the bank can prejudice the maker, he being, by such payment, absolutely discharged from the debt. *Smith* v. *The Essex County Bank*, 627

2. Hence, if the maker calls at the bank and pays the amount due upon the note, and takes it up, and the bank neglects to pay over the money to the holder, the maker cannot maintain an action against the bank, founded upon such neglect to account to the holder for the money. *ib*

BOOKS OF ACCOUNT.

If a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account. The rule is the same whether the books are produced by the plaintiff or the defendant. *Biglow* v. *Sanders*, 147

C

CARRIERS.

1. In an action against common carriers, to recover damages resulting from a delay in transporting sheep to market, within the time agreed, any loss sustained by the plaintiff by a fall in the market between the times when the sheep should have arrived, and when they did arrive, is a proper element of damages, to be taken into account by the jury, in connection with other facts and circumstances. *Kent* v. *The Hudson River Rail Road Co* 278

2. Whether the carriers are bound, as upon an express contract, to deliver property on a particular day, or to deliver it without unnecessary delay, makes no difference; inasmuch as the carriers' duty rests upon contract implied in law. They are bound to transport and deliver the goods within a reasonable time. *ib*

3. The defendants were common carriers from Lewiston to Niagara Falls by trains and wagons, but had no interest in, or connection with, any of the carrying business or companies beyond the falls. The Buffalo and Niagara Falls Rail Road Company carried goods and passengers between the falls and Buffalo, and goods destined for Detroit and places on the Michigan Central Rail Road were, at Buffalo, usually shipped upon some boat to Detroit, &c. The course of business in this respect, was generally known. The defendants received from the plaintiff, at Lewiston, two quarter casks of brandy, and gave the following receipt: "Received, Lewiston, Aug. 12, 1852, from W., C. & Co. of, &c. the following packages of goods on board the L. & B. R. line, in good order, to be delivered in like good condition." In the left hand margin, under this, was "Israel Kellogg, Kalamazoo, Mich. M. C. R. R." and opposite, on the right hand, "1 qr. cask brandy." Below this address was the following: in the left hand margin, "McCrea & Morton, Battle Creek, Mich. M. C. R. R." and opposite, at the right hand, "1 qr. cask brandy." Shipping bills were signed by W., C. & Co. corresponding with this receipt. Cards were put upon the casks, marked upon one, thus: "Israel Kellogg, Kalamazoo, Mich. M. C. R. R." and upon the other, "McCrea & Morton, Battle Creek, Mich. M. C. R. R." The casks of brandy were duly delivered by the defendants to the Buffalo and Niagara Falls Rail Road Co. at the falls, and that company transported them to Buffalo and shipped them on board a steamer of the Michigan Central Rail Road line, and the steamer and brandy were lost and sunk, in Lake Erie. *Held* that the receipt, signed by the defendants, did not contain any agreement to transport the casks of brandy to Kalamazoo or Battle Creek, but that it was only intended to embrace the route occupied by them as common carriers, the address being incorporated in the instrument merely for the purpose of identification; and that the defendants were not liable for the loss which occurred after the property had passed out of their hands. *Wright* v. *Boughton*, 561

CHARTER ELECTION.

On the 16th of January, 1855, the plaintiff was duly appointed chief of police of the city of Albany. A charter election for that city was held on the 2d Tuesday of April, 1856, for the election, among other officers, of a mayor, to hold his office for two years, to commence on the first Tuesday of May thereafter, at which P. and Q. were candidates for that office. At its next meeting after the election, viz. on the 14th and 15th days of April, the common council proceeded to canvass the inspectors' return of votes, and to determine and declare who was elected to the office of mayor; and they determined and declared, that P. had received the greatest number of votes and was duly elected mayor, and made and filed a certificate of that determination. On the 6th of May, when the term of office commenced, P. having taken and subscribed the oath, entered upon the discharge of the duties of the office. On the same day, the new common council proceeded to re-canvass the votes for mayor, and, upon such canvass, it was determined and declared that Q. was duly elected mayor, and a certificate of that determination was made and filed. On the 12th of May the new common council appointed a large number of persons to be members of the police department, in the place of others whose term of office was about to expire. Among others W. was appointed policeman. The officers so appointed refused to take the oath of office before the mayor, as required by law. W. preferred charges against the plaintiff, as chief of police, to Q. as mayor, and Q. assuming to act as mayor, received and entertained the charges, and with the recorder and one of the aldermen of the city, was proceeding to hear the charges against the plaintiff. The grounds of the charges were that the plaintiff had refused to recognize as police officers the persons appointed by the new

common council, until they should take the requisite oath of office before P. as mayor. On an application for an injunction to restrain Q. and the recorder and alderman from hearing or trying the charges, or making any decision thereon, until the right of Q. to act as mayor should be determined; *Held* 1. That the duty of the common council, in making the first canvass, was purely ministerial, and consisted in a simple matter of arithmetic; they not being at liberty to receive evidence of any thing outside of the returns of the inspectors. That in receiving affidavits tending to show fraudulent practices at the polls, and in omitting to canvass the votes of two election districts, on that ground, they acted illegally, and assumed to exercise a judicial power which the legislature had not vested in them. But that, having jurisdiction to make the canvass, their certificate entitled P. to the office, until the error should be corrected by legal proceedings. 2. That the old common council having canvassed the returns, and declared the result, however illegally they might have acted, their power over the subject, as canvassers, was spent, and the action of the new common council, in attempting to re-canvass the returns, on the 6th of May, and to determine and declare who was elected mayor, was unauthorized and void; they having no power to revise the action and correct the errors of their predecessors. 3. That the determination of the first board in favor of P., however erroneous it might be, had furnished him with *prima facie* evidence of his election; and that, having acted upon that evidence, qualified, and entered upon the discharge of the duties of the office, he became mayor *de facto*, and could not be displaced, except by an action brought for that purpose by some person claiming to be entitled to the office. And that P. being mayor *de facto*, Q., whatever his right, could not be mayor in fact at the same time, and did not derive even a *colorable* title to the office, from the determination of the second board of canvassers. 4. That the defendants were not authorized to proceed with the trial of the plaintiff upon the charges preferred against him, as chief of police, Q. having no jurisdiction to receive charges against the plaintiff, or to officiate as a member of the tribunal organized for his trial. 5. That the new policemen had been duly appointed, and whether they had taken any oath or not they were entitled to act. That the plaintiff had no right to inquire whether, and before whom, they had taken their official oath, but should have recognized them, and organized the police; and that his refusal to do so was erroneous. 6. That the plaintiff having voluntarily thrust himself into the controversy, between the claimants for the office, he was not entitled to an injunction to restrain the proceedings of the defendants, however illegal. *Morgan* v. *Quackenbush*, 72

CODE.

See EJECTMENT, 2, 3, 4, 5, 6.

COMMISSION TO TAKE TESTIMONY.

See DEPOSITIONS.

COMMON SCHOOLS.

1. Where the assessment of a school tax was made by two trustees, in the absence of the third, after which the two made out and signed a warrant for the collection of the tax, which was then carried by one of them to the third trustee, who also signed it; *Held* that the assessment was void, and that the trustees were trespassers in issuing the warrant and seizing and selling property upon it. *Keeler* v. *Frost*, 400

2. One of three trustees cannot delegate his authority to the other two, to make an assessment or apportionment. Neither can he, after they have made it, ratify and adopt the assessment by indorsing his approval, in the absence of the others. *ib*

3. The legislature has the power to specify the duties of librarians of school districts, and for a violation of those duties, may give an action, and fix the penalty which shall be recovered by the party aggrieved. The inhabitants of a school district may also make such regulations as they think proper, for the government of the librarian; and he is subject to the di-

rection of the trustees, in all matters relating to the preservation of the books. *Kennedy* v. *Ray*, 511

4. But in the absence of any regulations or directions touching the rights of the inhabitants, and the duties of the librarian, an action will not lie by a resident of a school district, against the librarian, for refusing to him or his children access to the library, and permission to take books therefrom. *ib*

CONSTITUTIONAL LAW.

An act of the legislature, entitled "An act to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes," contained eight sections. The first released the company from its obligation to build and maintain a plank road any further than the portion of the road which had been inspected and certified. The second authorized an abandonment of any portion of the road, and the third regulated the terms and conditions, and the manner, of effecting such abandonment. The next three sections authorized the company to relay their road with gravel instead of plank, and inflicted penalties for shunning the toll gates, although within 3 miles of each other. The seventh section legalized all the preliminary acts in the organization of the company, the subsequent acts of the company, and of various public officers, from time to time, in relation to it; and the eighth section was the usual enactment giving immediate effect to the whole statute. *Held*, that there was no constitutional objection to including all these provisions in one law, inasmuch as they all related to one general subject—the relief of the plank road company—by altering its fundamental articles, and modifying its obligations. But that the statute was in conflict with the spirit and intention, as well as with the letter of the sixteenth section of article three of the constitution, which requires that the subject of every private or local bill which may be passed by the legislature shall be expressed in the title. The whole of the act, with the exception of the first section, was therefore declared to be unconstitutional and void. *Town of Fishkill* v. *The Fishkill and Beekman Plank Road Company*, 634

COSTS.

See JURISDICTION, 1, 2, 3, 4, 5.

COUNTER-CLAIM.

1. Counter-claims, under the code of 1852, embrace both set-offs and recoupments, as they were understood prior to that code. *Pattison* v. *Richards*, 143

2. A counter-claim to be valid, under the code, must be a claim against the plaintiff on the record. The right to set up a counter-claim, against the assignee, after the assignment of a thing in action, is not reserved or given in any part of the code. *Spencer* v. *Babcock*, 326

3. Where a counter-claim, set up in an answer, was embraced in five different specifications, numbered as five separate defenses, neither of which, alone, was a defense; *Held* that the counter claim was not properly stated. *ib*

4. Each defense or counter-claim should be a complete single defense, of itself, without reference to others. *ib*

See SET-OFF.

COUNTY COURT.

1. Neither the county court, nor the supreme court, can reverse the judgment of a justice of the peace because it is against the weight of evidence. *Wiley* v. *Slater*, 506

2. If there is a disputed question of fact, upon which the case turned before the justice, or in relation to which there was evidence upon both sides, the county court should affirm the judgment, whatever may be its opinion as to the correctness of the justice's conclusion. *ib*

3 But if the judgment is entirely unsupported by evidence, so that it is really against law, the county court should reverse it; and if it fails to do

so, it is the duty of the supreme court to correct the error and reverse the judgments of both courts. *ib*

See JURISDICTION, 3, 4.

COVENANT.

Where a son agreed to support and maintain his father during his life, and covenanted that if, at any time, the father *should become dissatisfied* with living with him, the son would pay all reasonable charges for the board and necessary expenses of the father; *Held* that the father had a right to quit the family of the son whenever he became dissatisfied, without showing any good excuse for leaving; and that it was for him to judge whether there was good cause for dissatisfaction. *Hart* v. *Hart*, 606

CUSTODY OF CHILDREN.

1. In determining the question as to the care and custody of a child, in a contest between the surviving mother and the grand parents respecting such care and custody, the interest of the child should be the governing motive with the court; and whenever that is ascertained, judgment should be pronounced accordingly, irrespective of all other considerations. *The People ex rel. Wilcox* v. *Wilcox*, 178

2. Other things being equal, the mother of a female child, whose father is dead, is the most proper person to be intrusted with her nurture, care and custody *ib*

3. While a child is in the custody of its general guardian, duly appointed by the surrogate, it cannot be deemed under illegal imprisonment or restraint, merely from the guardian's refusal to deliver such child to its mother. *ib*

4. Upon a statute writ of habeas corpus, the powers of the officer are confined to the determination of the question whether there is an illegal restraint, and if so, to the removal of the restraint. And in the case of an infant, too young to make a choice, the officer must see that the infant is delivered to its legal custodian. To this extent the writ may be executed by a commissioner at chambers. *ib*

5. A justice of the supreme court, upon a statutory writ of habeas corpus, returnable before him at chambers, possesses no other powers than such as are possessed by a supreme court commissioner, under the statute. He cannot, therefore, exercise that species of jurisdiction which belongs exclusively to a court of equity. *ib*

6. But upon a petition addressed to the supreme court in equity, and presented to a justice of the court at chambers, out of term, such justice has power to entertain the proceedings, and to make an order that the care and custody of an infant child be committed to its mother, and that such child be delivered over by its general guardian to the mother, to remain with her until the further order of the court. *ib*

D

DAMAGES.

1. The plaintiff, being the owner of a raft of saw logs, lying at Port Maitland, Canada, made a contract with the defendants, who were the owners of a steamboat, by which it was agreed that the defendants would come to Port Maitland on the next Tuesday morning, with the steamboat, and would proceed up the river about five miles to D. and there land her passengers, and immediately return to Port Maitland and take the plaintiff's raft in tow and tow it to Black Rock, a distance of about 40 miles, which the steamboat could traverse in about 14 hours with the raft in tow. The usual time for the arrival of the steamboat at Port Maitland, upon her trips up, was 8 o'clock in the morning, and it generally took about two hours to proceed to D., land her passengers and return to Port Maitland. On Tuesday morning the weather was fair and the lake and river were calm, and so continued through the day. But the boat failed to call for the raft, according to the agreement. In the evening, at about sunset, she returned, and took the raft in tow, for Black Rock. During the night a storm arose, and the raft

went to pieces and was scattered along the shore. *Held* that, had the defendants entered upon the performance of their contract at the time specified, and used proper diligence in attempting to perform it, the plaintiff would have taken all the risk of storms or other casualties. But that, as the defendants delayed for some 14 hours to enter upon the performance of the contract, and as such delay resulted in the raft being overtaken by the storm, the defendants were responsible for the consequences. That when they took the raft in tow in the *evening* instead of the *morning*, as agreed, they took the risk of any storm that should arise after a sufficient time had elapsed for towing the raft to Black Rock if they had commenced the towing in the morning. *Parmalee* v. *Wilks*, 539

2. *Held also*, that the plaintiff had the right to fix the time in the contract; and to make it an essential part of the contract. That considering the dangers of navigation upon the lake, and the peculiar nature and condition of the plaintiff's property, he might determine when the voyage should commence, and make a special agreement to that effect. And, that upon the non-performance of the agreement, at the time specified, the party in default was liable for the damages resulting from causes which would not have arisen, had the agreement been performed. *ib*

3. A few days after the raft was thus broken up by the storm, the defendants agreed that if the plaintiff would collect the logs together, into rafts fit for towing, the defendants would take the logs in tow and tow them to Black Rock; *Held* that the expenses necessarily incurred by the plaintiff in collecting the logs and forming them into rafts, might be taken into the account, in estimating the damages arising from the breach of the contracts. *ib*

See SLANDER, 2.

DEBTOR AND CREDITOR.

1. A provision in an assignment made by debtors for the benefit of their creditors, directing the assignees, out of the net proceeds and avails of the assigned property, to pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively for work and labor done for the assignors, will not avoid the assignment, although the names of those creditors, with their places of residence, and the respective amounts due to each, are not mentioned. *Bank of Silver Creek* v. *Talcott*, 550

2. An assignment contained a clause directing that by and with the residue and remainder of the net proceeds and avails of the assigned property, if any, the assignees should pay and discharge all copartnership debts and demands of the assignors for which the assignees and A. T. were severally and jointly liable, either as drawer, indorser, guarantor or otherwise; and in case A. T. H. should be compelled to pay the whole or any part of two drafts for $3000 each, drawn by E. B. H. on B. H. B. and indorsed by the said A. T. H., at the request, and in part for the accommodation of the assignors, then that the assignees should pay to the said A. T. H. the amount that he should be compelled to pay on the said drafts. *Held* that this provision did not vitiate the assignment as showing an intent to hinder, delay or defraud creditors, or as directing the payment of debts not owing by the assignors and not contracted on their account. BOWEN, P. J. dissented. *ib*

3. *Held further*, that until there was some evidence to show the contrary, it must be presumed that the assignors were bound to indemnify A. T. H., and save him harmless from his indorsement. That in effect they alleged this, in the assignment, and the *onus* was upon the party charging the fraud, to disprove the statement. *ib*

4. *Held also*, that if the direction to the assignees to pay such amount as A. T. H. should be *compelled* to pay was to be construed as contemplating a defense by A. T. H. and consequent delay, and that the assignees must necessarily wait the termination of proceedings against A. T. H., or until the statute of limitations should attach, the delay was not of that character condemned by the statute. *ib*

5. A direction to the assignees to pay certain sums upon specified notes of

drafts, described as being made by other persons, is not controlling evidence of an attempt to appropriate the property of the assignors to the payment of debts other than their own. BOWEN, P. J. dissented. *ib*

6. Where the assignors, by the assignment, profess to devote their property to the payment of their debts, and they proceed to specify a debt, evidenced by the note of a third person, it does not follow that such debt was not their debt to pay, or that they would not be liable to the person who had undertaken to pay it, upon such payment being made. *ib*

7. Where assignors direct that the assigned property be applied to the payment of a note made by a third person, and a creditor of the assignors insists that this is an improper appropriation of the property, and that they have no right to make it, the burthen of proof is upon the creditor. *ib*

8. The simple production of the notes or drafts, with those clauses in the assignment in which they are described, will not prove an improper appropriation of the property of the assignors. The creditor must go further, and prove that the assignors have directed the payment of debts which they were not liable to pay, and for the payment of which they were not liable to indemnify the payors, or makers of the paper. *ib*

9. An assignment directed the assignees to pay $1350, being the amount of a promissory note made by F. & W. and indorsed by the assignors, and discounted by D., S. & Co. But this sum was not to be paid until F. & W. should have surrendered up and delivered over to the assignees, to be canceled, a note bearing even date with the one last mentioned, for the same amount and maturing at the same time, made by the assignors and payable to the order of F. & W. *Held* that this provision did not show the assignment to be fraudulent, and render it void, as imposing upon D., S. & Co. a condition which they were under no obligation to perform, and which they might be unable to perform. BOWEN, P. J. dissented. *ib*

10. *Held also*, that there was nothing in the assignment inconsistent with the position that the assignors and F. & W. exchanged notes; and this being so, that there was no evidence of any intention to hinder, delay or defraud any one, and that the *onus* of proving fraud was in the creditor assailing the assignment. *ib*

11. Where an assignment, properly understood, does not prove fraud, and there is no other evidence, the question is whether the provisions of the instrument are such that, when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation. *ib*

DECLARATIONS.

See WITNESS, 1.

DEPOSITIONS.

1. Upon the deposition of a witness, taken on commission, being offered in evidence at the trial, the defendants objected, on the ground that two cross-interrogatories, one embracing nineteen questions and the other five, were unanswered in part, but in what respect they were unanswered was not specifically stated. After the deposition had been received and read, the same objection was renewed, and exception taken. *Held*, that it would be an unjustifiable exercise of discretion to suppress the entire deposition, upon such a vague and indefinite objection; and that the refusal to do so was no ground for a new trial. HARRIS, J. dissented. *Valton* v. *The National Loan Fund Life Assurance Society*, 9

2. It is only when the officer neglects to put the interrogatories, as settled, or when the witness *refuses* to answer, that the deposition will be suppressed, on the ground of the commission having been imperfectly executed. *ib*

DOGS.

1. In an action to recover damages for alleged injuries to the plaintiff's dog, inflicted by the defendant's dog, whatever may have been the character and habits of the defendant's dog it is necessary for the plaintiff to

prove that he was the aggressor, or in the wrong, in that particular fight. If the plaintiff's dog provoked the quarrel and caused the fight, the defendant, as the owner of the other dog, cannot be made responsible for the consequences. *Wiley* v. *Slater*, 506

2. The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another. *ib*

3. A distinction is to be observed, between keeping a dog who is dangerous to human life, and one who is unwilling to have strange dogs upon his master's premises, and is in the habit of attacking and driving them off. *ib*

4. Owners of valuable dogs are bound to take a care of them proportioned to their value, and to keep them within their own precincts or under their own eye. *ib*

5. It is not a general rule that when two dogs fight and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog. *ib*

E

EJECTMENT.

1. Where the plaintiff had been in possession of premises for several years, claiming title thereto, and the defendant went into possession under a contract with the plaintiff, by which the defendant agreed to purchase the plaintiff's improvements, and his title to the premises as soon as it should be settled, if it should prove to be good; the title, as stated in the contract, being then in dispute; *Held*, that this was abundant evidence of title in the plaintiff to sustain an action of ejectment, aside from the rights of the defendant under the contract. That the prior possession of the plaintiff was prima facie evidence of his title, and the defendant, by taking possession under him, was precluded from disputing his title, except to show that he, the defendant, was not in default in performing the contract. And this, notwithstanding the recital that the title was in dispute; a better title than the plaintiff's not being recognized. *Spencer* v. *Tobey*, 260

2. All the general provisions of the revised statutes relating to actions concerning real estate, where no specific inconsistent provision is made in the code on the same subject, remain in force, and are to be applied and adapted to actions under the code. *St. John* v. *Pierce*, 362

3. Whenever the code defines or declares a right, or provides a remedy, such provision must prevail, and repeal any and every inconsistent provision in the revised statutes. *ib*

4. The section of the revised statutes, declaring that the declaration in ejectment may contain several counts, and that several parties may be named as plaintiffs, jointly, in one count, and separately, in others, relates merely to the *remedy*, and is therefore repealed by the code, as being inconsistent with its provisions respecting the parties to actions, the form of actions, and with the whole scope of the code. WELLES, J., dissented. *ib*

5. Those provisions of the code are in conflict with the theory of separate counts in the name of separate plaintiffs, for the same cause of action, as in the former action of ejectment, and of separate counts in favor of the same plaintiff, for the same cause of action, as in other actions. WELLES, J., dissented. *ib*

6. The intent of section 455 of the code was that the change made in the form of the remedy should not affect any substantial right, nor change any provisions relating to the remedy that can be adapted to, and applied under, the code, in perfect consistency therewith. *ib*

ESTOPPEL.

See MORTGAGE, 13.

EVIDENCE.

1. Parol evidence is always admissible to apply a written contract to the

facts, or to show the extrinsic facts to which the contract relates, and its practical execution in reference to such facts. *Spencer* v. *Babcock*, 326

2. In an action by S. as the assignee of a demand held by A. against B., proof by the defendant that he and A. had been partners in trade, and that A. was indebted to B. on an unadjusted account, to a large amount, arising out of their partnership dealings, and that the liability of the defendant for which the suit was brought, was connected with the partnership transactions, is inadmissible in support of a counter-claim set up in the answer. *ib*

3. Where a sheriff has executions in his hands in favor of different creditors, against the same debtor, whatever is said by either creditor, especially in the presence of the other, at the sale, by way of direction to the sheriff, is proper evidence. *Smith* v. *Hill*, 656

See AGREEMENT, 7.
RAIL ROAD COMPANIES, 2, 8, 14.

EXCISE LAW.

1. In an action brought in a justice's court, to recover penalties for violations of the excise law, it is a sufficient indorsement of the summons if it states that such summons is issued "according to the provisions of title 9, part 1, chapter 20 of the statute of excise and the regulation of taverns and groceries." *Perry* v. *Tynen*, 137

2. In an action against several defendants to recover penalties for violations of the excise law, it being proved that the defendants were proprietors of a store, doing business together, and present in the store daily; that sales by small measure, of spirituous liquors, were made there by a clerk of the defendants, some of which occurred in their presence; *Held*, that this proof warranted the conclusion that the sales were made by their authority; and that they thereby incurred the penalty, in like manner as if they had sold personally. *Hall* v. *McKechnie*, 244

3. *Held further*, that the penalty for each offense was single, and that the defendants having united in committing the offenses, were jointly liable for the penalties incurred. *ib*

EXECUTION.

1. A levy upon sufficient personal property is not *per se* a satisfaction of the judgment. *Denvrey* v. *Fox*, 522

2. An execution issued upon a justice's judgment directs the constable to levy, of the goods and chattels of the defendant, the amount of the judgment. There is no restriction upon the officer as to the amount of property he shall take; nor is he required to levy upon all the property at the same time. *ib*

3. He may, therefore, after having levied upon sufficient property to satisfy the execution, levy upon other property, at a different time, and sell it, without making himself liable as a trespasser. *ib*

4. Where a party forbids the sale of personal property, on execution, upon the sole ground that the property is *exempt* from sale, this will be considered a virtual admission that the execution and sale are *in other respects* legal and valid. *Smith* v. *Hill*, 656

5. The claim that property levied on and sold upon execution is *exempt* from execution, is a claim personal to the defendant in the execution; and he, only, can avail himself of the privilege. *ib*

6. An assignee of the judgment debtor, although claiming under a general assignment which does not except exempt property, cannot claim property as exempt from execution, after having stood by at the time of the sale thereof on execution, and made no claim to the property as assignee. *ib*

7. The presumption is that a sheriff, selling property on execution, has done his duty and previously made a levy. And this fact will be considered as admitted, if a party omits to raise the objection on the trial. *ib*

EXEMPTION.

See EXECUTION, 4, 5, 6.

F

FORECLOSURE SUIT.

1. Where C. purchased mortgaged premises from B. the mortgagor, in 1816, subject to the lien of the mortgage, and expressly agreed to pay the mortgage: *Held* that this agreement was a recognition of the mortgage; and that as twenty years had not elapsed, since such recognition, before the commencement of a suit to foreclose the mortgage, which was in 1832, payment of the mortgage could not be presumed. *Harrington* v. *Slade*, 161

2. And S. having purchased the mortgaged premises *pendente lite*, from two of the defendants in the foreclosure suit, and claiming under C., *Held* that he was bound by the admissions and acknowledgments made by C. while owner of the premises; that the plaintiff had the right to make him a party to the suit by supplemental bill; and he having been thus made a party, it was *further held* that he was to all intents and purposes a party to the original suit, and had no right to claim that the foreclosure suit was not commenced, as against him, until the filing of the supplemental bill. *ib*

3. The voluntary alienation of property, pending a suit, by a defendant therein, is not permitted to affect the rights of the other parties to the suit. *ib*

FORMER SUIT OR RECOVERY.

1. A judgment recovered in another court, by the defendant, in a former suit commenced by the plaintiff's agent, for the same cause of action for which a second suit is brought, is a bar to the plaintiff's claim, unless it appears that the former suit was commenced and prosecuted without the plaintiff's authority. *Kent* v. *The Hudson River Rail Road Co.* 278

2. It is also a bar, though the former suit was commenced without authority, if the plaintiff has since ratified the agent's authority. *ib*

FRAUD.

1. The principle is well settled, that where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages. *Nickley* v *Thomas*, 652

2. Thus, where the defendant, upon an exchange of horses with the plaintiff, told him that his horse had *balked* with S. (a former owner) once, but that he whipped him and made him go; but the defendant did not disclose to the plaintiff the fact that he *purchased the horse as a balky horse*, and that his brother and himself had used him *carefully*, as they would use any horse that was balky, while he owned him, and that S. had so used the horse before he sold him to the defendant; *Held*, that this was a fraudulent concealment of material facts, in relation to the defect, which rendered the defendant liable in an action for damages. *ib*

3. It is not enough that a vendor tells the truth in respect to the article sold, as far as he goes. He should tell the whole truth, fully and fairly. *ib*

4. Fraud should not be presumed from the provisions of an instrument which admits of a contrary construction. *Bank of Silver Creek* v. *Talcott*, 550

G

GAS WORKS.

Gas works, *it seems*, are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied; and whenever they create a special injury they are to be regarded as a *private nuisance*, and an action will lie in favor of the person sustaining the special injury. *Carhart* v. *The Auburn Gas Light Co.* 297

GUARANTY.

1. In an action upon a guaranty indorsed upon a promissory note, it is not necessary to prove, by witnesses, the signature of the maker of the note. This is sufficiently proved, as against the guarantor, by proving his execution of the guaranty. *Cooper* v. *Dedrick*, 516

2. Where it is proved that the plaintiffs were partners in business two or three years since, and there is no evidence of any change, or dissolution of partnership, the presumption is that they are still partners. *ib*

3. When a guaranty is written upon a note, and the note is transferred, the sale and delivery of the note with the guaranty upon it, furnishes *prima facie* evidence of a sale of the contract of guaranty. And the possession of the note and the guaranty is *prima facie* evidence of a right, in the holder, to the guaranty, and will authorize him to maintain an action thereon, unless it be shown that the contract of guaranty was not transferred, at the time the note was transferred. *ib*

4. Where a guaranty is expressed to be "for value received," the consideration is sufficiently expressed to satisfy the requirements of the statute of frauds. *ib*

GUARDIAN AND WARD.

1. A purchase by the guardian ad litem of infant parties to a partition suit, of lands sought to be partitioned in such suit, at a sale thereof by a referee, which purchase is not made for the benefit, or in behalf, of such infants, is void. *Lefevre* v. *Laraway*, 168

2. And it matters not that the purchase was not made by the guardian for his own benefit, but as agent for other persons. The guardian owes a duty to his wards, which renders it improper for him to act in behalf of others. *ib*

3. Where the fact of a purchase by a guardian, for the benefit of third persons, at a price injurious to the interests of the infant defendants, has, by a motion of the plaintiff for a resale, been brought to the knowledge of the court, it is the duty of the court, without waiting for an application to be made in behalf of the infants, to order a resale of the property, for their benefit. *ib*

4. An appointment of a guardian, made by a surrogate, is to be deemed valid until reversed. It cannot be assailed in a collateral way, by proceedings upon *habeas corpus*. *The People ex rel. Wilcox* v. *Wilcox*, 178

5. The statute is imperative that upon an application being made to the surrogate, for the appointment of a guardian of an infant, the surrogate shall assign a day for the hearing. But if he determines that notice to the relatives need not be given, he may assign the day on which the application is presented: And where there is nothing to show that this was not done, it will be presumed that the surrogate assigned the day of the application, for the hearing. *ib*

6. The statute confers a discretion upon the surrogate, in respect to requiring notice to be given to the relatives of a minor, residing in the county, of an application for the appointment of a guardian. *ib*

7. A court of equity possesses a controlling and superintending power over all guardians, whether testamentary or appointed by the surrogate. And it will exercise that power by taking the ward from the guardian, and delivering it to its mother, or some other person, whenever the interest of the ward requires it. *ib*

H

HABEAS CORPUS.

See CUSTODY OF CHILDREN, 4, 5.

HIGHWAYS.

The control and management of highways and bridges are vested in the officers of the town who are chosen for that purpose. *Town of Fishkill* v. *The Fishkill and Beekman Plank Road Co.* 634

See TOWNS.

HUSBAND AND WIFE.

1. Where husband and wife agree to separate, a stipulation on the part of the husband to pay a specified sum annually, for the separate maintenance and support of the wife, is valid, and may be enforced. *Calkins* v. *Long*, 97

2. If the separation be intended to be only temporary, then, if the husband offer to take back his wife, and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to the wife. But if the separation be intended to be permanent, that is, during life, then the offer of the husband to cohabit with his wife does not put an end to the contract for separate maintenance. *ib*

3. Where work and labor are performed and materials furnished, by a carpenter, in erecting buildings upon the separate estate of a married woman, at the request of her and her husband, and the husband is insolvent, the wife's separate estate may be charged, in equity, with the payment of the debt. T. R. STRONG, J. dissented. *Colvin* v. *Currier*, 371

4. The separate estate of a married woman, in real property owned by her, since the acts of 1848 and 1849 in relation to married women, is none the less a *separate* estate because it is a *legal*, instead of an *equitable*, estate. *ib*

5. And where such separate estate has been benefited, and increased in value, by erections made thereon, upon the faith of such estate, and the creditor will be remediless unless payment out of such estate be enforced by a court of equity, jurisdiction will be entertained by those courts, on the ground that it is a part of their duty to prevent acknowledged wrongs, and to protect acknowledged rights, when courts of law are inadequate to afford relief. *ib*

6. The only difference between the separate estate of a married woman, as previously recognized and acted upon by courts of equity, and their title to property acquired or held under the acts of 1848 and 1849, is, that the former is an equitable, and the latter a legal, estate or title. *Per* WELLES, J. *ib*

7. And giving relief to creditors against the separate estate of married women acquired or held under the acts of 1848 and 1849, is only extending an ancient and well established principle of equitable jurisprudence to a state of things created by the legislature, and which is clearly within the reason and necessity of the principle. *Per* WELLES, J. *ib*

I

INFANTS.

1. It results from the fact of an infant's contract not being binding upon him, unless it be for necessaries, that a new promise, made by him after he becomes of full age, must possess all the ingredients of a complete agreement, to enable the creditor to recover. *Hodges* v. *Hunt*, 150

2. Hence, as no agreement is complete until the minds of the contracting parties meet, the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise creates a new contract; and the old debt supplies the consideration. *ib*

3. Most of the contracts of infants not being binding upon them, a new promise does not impart to a contract any legal validity, so as to enable the creditor to enforce it; but the new promise creates a new contract, founded upon, and deriving its aliment from, the old demand, upon which the creditor may sustain a suit against the infant. *ib*

See JUDICIAL SALES, 4, 5, 6.
JUSTICES' COURTS, 12.

INJUNCTION.

1. An injunction can be granted only when it appears *by the complaint* that the plaintiff is entitled to the relief demanded. There must therefore be a complaint, upon which to found a motion for an injunction. *Morgan* v. *Quackenbush*, 72

2. But if the motion is made upon an *affidavit* which contains all the requisites of a complaint, as prescribed in the 142d section of the code, that is sufficient. *ib*

See CHARTER ELECTION.

INSURANCE COMPANIES.

1. Where individuals claiming that an insurance company was organized and only authorized to do business as a mutual insurance company, and upon

the plan of mutual insurance, and that policies issued to certain persons in consideration of a premium paid in cash, and upon the principle of insurance for cash premiums, were unauthorized and void as contracts of the company, brought an action, as the makers of a premium note held by the receiver of the company, to restrain him from assessing, or collecting of them, any amount for the payment of losses upon policies effected in consideration of a cash premium, or from applying any of the assets of the company to the payment of such losses, and for an accounting by the receiver; *Held*, that the creditors of the company had an interest in the controversy, adverse to the plaintiffs, and were necessary parties defendants. *Hubbard* v. *Eames*, 597

2. If such an action is brought against the insurance company, and its receiver, only, and judgment is rendered therein, according to the prayer of the complaint, creditors of the company upon policies of insurance effected upon the principle of insurance for cash premiums, may apply by motion, while the proceedings are open, and before any final judgment has been given, to vacate and set aside the judgment in such action, so far as it affects or passes upon the rights of the claimants under the cash policies, or gives direction to the funds or property in the hands of the receiver, to their prejudice, or without making provision for the payment of such claims. *ib*

INSURANCE (FIRE.)

1. A fire insurance company located in another state, by a written instrument constituted and appointed A. its agent at Lockport, for the term of two years, "with authority to act in the capacity of an insurance broker, for the purpose of receiving applications for insurance and transmitting them to the home office, and otherwise aiding in the negotiation of fire insurance and in the transaction of business pertaining thereto." *Held*, that the agent had no authority to bind the company to issue a policy. *Chase* v. *The Hamilton Mutual Ins. Co.* 527

2. An application was made by the plaintiff to A., the agent of an insurance company, for insurance, which, on being forwarded to the company by A. was rejected, on the ground that the risk must go into another company (the Manufacturer's) at 2½ per cent. And A. was requested by the company, if the plaintiff desired it, to return the application upon one of the Manufacturer's blanks. A., after communicating with the plaintiff, sent forward another similar application, and requested that a policy should be sent, at as low a rate as possible, and suggested that perhaps the plaintiff would pay 2 per cent. The agent sent, at the same time, an application from another person, for insurance to the amount of $200. The president of the insurance company replied, "I shall fix the rate of the two risks to day received, one of $1500 and one of $200, at two per cent, $34." This proposition was communicated, by A., to the plaintiff, who at once accepted it, and paid to A. the amount necessary, in addition to what had been previously sent, to make up the sum of $30, and took a receipt from A. for the amount, which stated it to be the balance of $30 premium for an insurance of $1500 on his dwelling insured in the H. Ins. Co. *Held*, that the contract was fully completed between the parties when the plaintiff accepted the company's terms and paid the premium to A.; and that the company was bound to issue a policy to the plaintiff, and was liable for a loss which had occurred, to an amount not exceeding $1500.

3. *Held also*, that no time being fixed by the company within which the proposition was to be accepted and the money sent, the law would fix a reasonable time. And that accepting the proposition and paying the premium by the plaintiff to the agent, the next day after being notified of the offer, was within a reasonable time. *ib*

4. *Held further*, that if the money was paid to the agent before the loss occurred, it was sufficient, although it was not forwarded to the company, by the agent, until after that event happened. *ib*

5. In the letter of the president of the insurance company to A., fixing the rate of premium to be charged, he called the attention of A. to his accounts, and asked him to make some

arrangement to meet the amount due for premiums, before they should write any more policies for him, " or that the money should accompany the new policies." He added, " The amount due on these would be $30.60. If that be sent, we will forward policies." The latter part of this letter was not communicated to the plaintiff, by A. *Held*, that this was not a *condition* annexed to the liability of the company, requiring that the money should be actually in the company's hands before the contract should be binding. *ib*

6. The by-laws of an insurance company provided that any policy issued by it should be void unless the true title and interest of the assured was expressed in the proposal or application for insurance, and unless all incumbrances, and the amount and nature thereof, were therein disclosed. The plaintiff having previously entered upon land by virtue of a contract for the purchase thereof, and having erected a dwelling house thereon, and paid all the purchase money, so as to entitle him to a deed of the premises, applied for insurance upon the house, describing it as his stone dwelling house, and as belonging to him; *Held*, that this was not a false warranty or representation of the plaintiff's title to the property insured, within the meaning of the by-law, or in any sense; the plaintiff being in fact the owner of the property, and entitled to the legal title. *ib*

7. Where an application for insurance described the property merely as a stone dwelling house, and it appeared from the notice of loss that it was in fact a three story dwelling house, 28 by 34 feet, *with a one story wood kitchen part attached thereto*, 12 *by* 14 *feet*, but there was nothing to show whether the kitchen part was a mere temporary structure, or how it was constructed and attached; *Held*, that upon the evidence, the court could not say that the referee was bound to find a false representation or description of the property insured. *ib*

8. Where the by-laws of an insurance company declare that unless the applicant for insurance shall make a true representation of the property on which he requests insurance, " *so far as concerns the risk and value thereof*, the policy issued thereon shall be void," it is only those representations which concern the *risk* and value of the property that are material. Hence, the question arising upon all omissions to make true representations of the property become questions of fact, whether the risk was increased, or the value overstated. *ib*

INSURANCE, (LIFE.)

1. Where an individual makes a contract of life insurance, in his own name, the legal presumption is that the policy is for his benefit, and not for that of any other person. *Valton* v. *The National Loan Fund Life Assurance Society*, 9

2. A person has an insurable interest in his own life; and no use made by the assured, of the policy, *subsequent* to the contract of insurance, will convert it into a wager policy. If valid in its inception, he may dispose of it as he pleases. HARRIS, J., dissented. *ib*

3. There can be no wager policy, within the statute, unless the contract of insurance is made with a party who has no insurable interest in the life insured. The term can never apply when the policy is issued to the party whose life is insured, and when thus the contract is made directly with him. HARRIS, J., dissented. *ib*

4. It is only when an insurance contract falls within the category of a mere wager or bet—a simple gaming adventure—that the statute against wagers can, even by construction, apply. *ib*

5. It is always a question of legal construction, whether an insurance contract comes within the purview of the statute. *ib*

6. Where a party insures *his own life* even if it be for the benefit of another the latter advancing the money to pay the premium, such contract is not void for the reason that the statute against betting and gaming has been violated; *it seems*. *Per* WRIGHT, J. *ib*

7. Where M., V. and S. formed a partnership, the capital being furnished by M. and V.; and S. although ad-

vancing no capital, was to share equally in the profits on account of his skill in the business, but in lieu of capital on the part of S., and as an indemnity to his copartners, an insurance was effected on his life, with the understanding that if he should die, unmarried, during the continuance of the partnership, the benefit of the policy should go to the survivors of the firm; *Held* that although M. urged the making of the contract, and aided in its successful completion, yet as the insurance was effected by S. in his own name, and not as the agent of M. and V. or for their exclusive benefit, but for the benefit, in part at least, of S., the policy was not void as being a wager policy. HARRIS, J. dissented. *ib*

INTEREST.

Where a contract for the payment of money is made in one place, and payment in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. *Pomeroy* v. *Ainsworth*; 118

J

JUDICIAL SALES.

1. The English practice, of opening biddings and ordering a resale, before the confirmation of the sale, upon an offer being made of an advance of ten per cent and an indemnity to the purchaser, has not been adopted in this state. Here, neither before nor after the confirmation of the report of the sale, will a resale be ordered upon an offer of an increase of price, alone. *Lefevre* v. *Laraway*, 167

2. In this state, special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale. *ib*

3. A resale will be ordered where there has been fraud, or misconduct, in the purchaser; fraudulent negligence or misconduct in any other person connected with the sale; or surprise or misapprehension, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. *ib*

4. Infant owners will be relieved, by a resale, where their property has been sacrificed at the sale, through the misapprehension or negligence of their natural or statutory guardians, on condition that a full indemnity is offered to the purchaser. *ib*

5. Whenever, in a suit or proceeding in the supreme court, the fact appears, that the rights of infant parties have been invaded, or are in danger of being prejudiced, the court ought, without waiting to be specially invoked to do so, to exercise its protective jurisdiction in behalf of such infant parties. *ib*

6. Although no application for a resale is made in behalf of infants, yet such an order may be made on the court's own motion, in its capacity of universal guardian to all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property. *ib*

JURISDICTION.

1. An application was made, to the surrogate, by W. executor, and others legatees of W. P., to prove his will. O. P. contested its validity, and the surrogate refused to admit it to probate. The applicants appealed to the supreme court, and that court reversed the decision of the surrogate, directed the will to be admitted to probate, and ordered the costs of O. P. to be paid out of the estate. These costs were paid. Subsequently O. P. appealed from the decision of the supreme court to the court of appeals. That court reversed the decision of the supreme court, and awarded a new trial, *with costs to abide the event*. The supreme court directed an issue to be formed, for the trial of the question of fact in reference to the proof of the will. A trial was accordingly had, before a jury, and the decision was in favor of the validity of the will. This decision being certified to the surrogate, the will was admitted to probate. The executor and legatees then applied to the supreme court for costs of the appeals, and of the feigned issue; and for an order that O. P. repay the sum paid him for costs, in pursuance of the order of the supreme court which was reversed. *Held* that the supreme

court had not lost its control over the case, but that it still had the power to impose upon the contestant the payment of the costs of the feigned issue. He was accordingly directed to pay those costs, and to refund to the executor the costs of the appeal to this court from the surrogate, which had been paid by the executor. *Whitbeck* v. *Patterson*, 83

2. But it was *further held*, that this court had no control over the costs in the court of appeals, or power to direct the payment thereof by the contestant. *ib*

3. Where an appeal is taken, to the supreme court, from a judgment of a county court, on the ground that the latter court had no jurisdiction of the subject matter for which the action was brought, the supreme court has jurisdiction to reverse the judgment and to award to the appellant his costs in that court. *Gormly* v. *McIntosh*, 271

4. But where the want of jurisdiction is apparent on the face of the summons and complaint, the county court should dismiss the suit without costs. And in such cases the appellant cannot recover costs in the supreme court, for the proceedings in the county court. *ib*

5. Where the want of jurisdiction does not appear upon the face of the proceedings, but is presented by plea or demurrer, the court has jurisdiction to pass upon and determine the question presented; and in such a case the party prevailing is entitled to costs. *ib*

6. Where an action was originally commenced in a justice's court, and the defendant put in a plea of title there, and gave the undertaking required by sec. 56 of the code; whereupon the action before the justice was discontinued, and a new action for the same cause was commenced in the county court, by a summons and complaint in the usual form, and the defendant appeared and put in an answer denying the material matters stated in the complaint; *Held*, that the appearance of the defendant and putting in an answer by him without objecting that the jurisdiction of the county court did not appear from the summons and complaint, was to be deemed a waiver of that objection, and an admission that the case was within the jurisdiction of the court. *The Clyde and Rose Plank Road Co.* v. *Parker*, 323

7. *Held also*, that the rule that the jurisdiction of an inferior court must appear upon the record, does not necessarily require that it be set out in the complaint and summons in such a case. *ib*

8. If the plaintiff, on recovering at the circuit, in an action thus commenced, makes up a judgment roll, containing all the papers and proceedings from the commencement of the suit before the justice to the final judgment in the county court, as he is entitled to do, under the 281st section of the code, the record will show the jurisdiction of the county court, upon its face. *ib*

9. Hence, a summons and complaint in the ordinary form, without any recitals or averments conferring or showing jurisdiction, are a sufficient compliance with the statute, and the jurisdictional facts *aliunde* can properly be proved on the trial, or presented to the court with, or as a part of, the pleadings, like an offer under section 368 of the code. *ib*

10. Although consent cannot confer jurisdiction, yet where the court has jurisdiction of the subject matter, consent will dispense with recitals or statements in the pleadings in mere matters of form. *ib*

11. The supreme court, at special term, has no power, under the act of April 17, 1854, for widening Fulton street, in Brooklyn, to make an order authorizing the common council to discontinue proceedings for widening such street. *The People ex rel. Fisk* v. *The Common Council of Brooklyn*, 404

See GUARDIAN AND WARD, 3, 6, 7.

JUSTICES' COURTS.

1. In an action brought before a justice of the peace, the complaint alleged that the defendant made an assault upon the horse of the plaintiff, while

said horse was attached to a buggy wagon, "*and while plaintiff was in said wagon*, by willfully and maliciously striking, whipping, beating and pounding said horse with a whip and hoe; and greatly injured, hurt and damaged said horse, and caused said horse to rear up, jump and run, *while said plaintiff was in said buggy wagon*, causing said horse to be greatly frightened, to plaintiff's damage $100." *Held* that the action was not one for an assault and battery, upon the complaint as put in; but that it was proper for the justice to permit the plaintiff to amend the complaint by striking out the allegations relative to the plaintiff's being in the wagon, at the time of the occurrence; and that after such amendment the action was clearly an action for injuring property; which the justice had jurisdiction to try. *Bull* v. *Colton*, 94

2. Service of notice of the intended examination of an assignor, as a witness, in a justice's court, cannot be made upon the attorney of the opposite party, before such party has appeared, and before issue has been joined, in the action. *Butler* v. *The New York and Erie Rail Road Co.* 110

3. Whether service of a notice of that character, upon the attorney of a party, is good in any case? *Quære.* *ib*

4. Where, on a trial before a justice, there is evidence on both sides, the judgment of the justice cannot be reversed by the county court, although the verdict of the jury was against the weight of evidence. And if, in such a case, the county court reverses the judgment of the justice, its judgment of reversal will be reversed by the supreme court. *Rogers* v. *Ackerman*, 134

5. A justice of the peace has authority to allow a constable to amend his return to a summons. And the refusal of the defendant to appear, will not deprive the justice of this right. *Perry* v. *Tynen*, 137

6. The power of amendment does not depend upon the appearance of the defendant in the suit. *ib*

7. Whether a service upon the defendant of a copy of the indorsement on the summons is necessary? *Quære.* *ib*

8. Where the evidence, on a trial before a justice of the peace, is not undisputed and not entirely free from doubt, the county court, on appeal, ought not to reverse the judgment of the justice, even if it should be conceded that it was against the weight of evidence. *Biglow* v. *Sanders*, 147

9. The rule is, that it is only where the facts are undisputed, or the evidence is not conflicting and is free from reasonable doubt, that the judgment of the justice can be set aside upon the ground that such judgment, or the verdict of the jury on which it is founded, is against evidence. *ib*

10. The words "*errors of fact*," in the 366th section of the code, do not refer to an erroneous finding of the court or jury upon the evidence, but to those errors of fact which do not appear from the record or evidence, such as infancy, coverture, &c. of some of the parties. *ib*

11. A reply not being admissible, in justices' courts, the allegation of new matter, in an answer, must in all cases necessarily be deemed controverted by the plaintiff; and it is competent for him to countervail it by evidence either in direct denial, or of new matter by way of avoidance. *Hodges* v. *Hunt*, 150

12. Therefore, where, in an action commenced in a justice's court, the defendant puts in an answer setting up the defense of infancy, the plaintiff may, without replying, or amending his complaint, prove the making of a new promise by the defendant, after he became 21 years old. *ib*

13. There is no particular mode by which counts or causes of action are to be separated and distinguished from each other, in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. *Hall* v. *McKechnie*, 244

14. Where a complaint, in a justice's court, purported to contain four several counts, or to state four distinct causes of action separately, it being averred in the first count that the defendant was indebted to the plaintiff as overseers of the poor in the sum of $25, whereby an action had accrued

to them as such overseers, according to the statute, specifying the title and two of the sections, which sections impose a penalty of $25 for selling strong or spirituous liquors or wines, in small quantities without a license, to be recovered by an action in the name of the overseers of the poor; and each of the subsequent counts stated a further indebtedness in a like sum, and was otherwise in form similar to the first; *Held*, that the complaint was sufficient, in substance. *ib*

15. If a defendant, in a justice's court, designs to raise the objections that the complaint is not sufficiently explicit, or that it does not contain a cause of action, he should raise them by demurrer. The objection of indefiniteness and uncertainty will be waived by not thus making it. And so, *it seems*, in respect to the objection that a cause of action is not stated. *ib*

16. Where the parties go to trial upon a complaint, however defective, without objection on account of the defects, if the plaintiff proves a good cause of action, a judgment in his favor will be good. *ib*

17. An action brought in a justice's court, against an attorney, to recover back money which it is claimed that he has taken from the plaintiff by charging illegal fees in bills of costs collected of him, is not to be regarded as an action of assumpsit based upon an implied promise. *Waters* v. *Whittemore*, 593

18. It therefore is not an action for money due upon a contract, express or implied, within the meaning of the first section of the act of April 26, 1831, and consequently the provision of the act abolishing imprisonment for debt arising upon contract does not apply to the case, and a justice of the peace has no jurisdiction to issue a short summons, against a defendant residing out of the county. *ib*

9. But if such an action were to be regarded as based upon an implied promise, it is exempted from the operation of the provisions of the act of April 26, 1831, allowing a short summons, by the 2d and 30th sections of that act, on the ground that an attorney is a *public officer*, and that it is official misconduct in him to charge and receive more fees for any service than the statute allows. *ib*

20. A short summons cannot be issued, in any case, against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract, express or implied. *ib*

21. Where a defendant, on a trial before a justice, omits to raise the objection that there is a lack of the evidence necessary to sustain the plaintiff's case, and it is assumed on such trial, that the proof is complete, this court, on appeal, will hold that it was sufficient. *Smith* v. *Hill*, 656

See EXCISE LAW, 1.

L

LANDLORD AND TENANT.

1. Where a farm is let on shares, for cultivation, and wheat is raised thereon, by the tenant, the straw is a part of the crop, and belongs to the owners thereof; unless there is some stipulation or custom to the contrary. *Fobes* v. *Shattuck*, 568

2. It does not necessarily belong to the farm, nor is there any general usage requiring it to be used, as manure, upon the land where it grew. *ib*

LEASE.

1. A lease of agricultural lands for 12 years, with a covenant of renewal for 12 years longer if the lessor shall live, and a further covenant to continue the renewals every 12 years so long as the lessor shall live, is good for the first 12 years, but the covenants for renewal are void as being in contravention of section 14 of article 1 of the constitution. *Hart* v. *Hart*, 606

2. The covenant for renewal, being an independent covenant, may fall without impairing the grant for the first 12 years. *ib*

3. A lease from father to son, of real estate, for a term of years, with a covenant on the part of the lessee *to*

support the lessor, during his life, is no evidence of a settlement of accounts between the parties, so as to bar a set-off by the son, in an action by the father, upon the covenants in the lease. *ib*

LICENSE.

1. A permission by parol, from the owner of land, to another to take gravel therefrom, is sufficient to protect such person from liability; a parol license to enter upon land and remove a part of the soil, being a complete justification of acts done under it. *Syron* v. *Blakeman*, 336

2. Where, in an action for gravel sold and delivered to the defendant, it was proved that in 1853 and 1854 the plaintiff and others, all acting under the direction of the defendant, went on land in the plaintiff's possession, and took gravel from the same, and put it on the road; that in 1853, before the gravel was drawn, the plaintiff told the defendant he could go there and get gravel to draw on the road; and it was inferrible from the evidence that the defendant was overseer of highways, and acting as such; *Held* that the license was to be construed as authorizing the taking of the gravel without compensation, and that such license was not limited as to time, but continued until 1854, or would be implied, under the circumstances; and that consequently the plaintiff was not entitled to recover. *ib*

LIMITATIONS, STATUTE OF.

1. Where the makers of a promissory note, within six years before suit is brought thereon, and before a suit is barred by the statute of limitations, assign their property to trustees, in trust for the benefit of creditors, and direct them to pay such note, among others, in full if there shall be sufficient property, and if not, then to pay a ratable dividend upon it, with other debts, and the assignees, in pursuance of such direction, make a dividend of 50 per cent upon the note, and pay the amount to the holder, this payment will be treated as the act of the makers themselves, by their agent duly authorized for that purpose, and as evidence of a new promise by them to pay the note. *Barger* v. *Durvin*, 68

2. A payment made by a part of the joint and several makers of a promissory note, within six years before suit is brought thereon, and before a suit is barred by the statute of limitations, will not revive the debt, as to the other makers. *ib*

LIS PENDENS.

1. A *lis pendens* is constructive notice to a purchaser from the defendant, and he, and his interest, will be bound by the decree entered in the suit. *Harrington* v. *Slade*, 161

2. Where the plaintiff makes a purchaser pendente lite a party to the suit, the latter is bound by the previous proceedings in the suit; and he comes before the court in the same plight and condition as the former party, and is bound by his acts, and may be subject to the costs of the proceedings, from the beginning. *ib*

M

MANDAMUS.

1. Under the provisions of the revised statutes and the code it is for the attorney general, and not the supreme court, to determine whether, in any particular case, it is proper that an action to try the right to an office shall be brought, or not. Consequently a mandamus will not lie, to compel the attorney general to prosecute an action of that nature. *The People ex rel. Peabody* v. *The Attorney General*, 114

2. The common council of the city of Brooklyn adopted the following resolution: "Whereas, that part of Fulton street opposite the city hall is very narrow, and the present is the best opportunity the city may have for some time to widen said street, therefore, resolved, that the matter of widening said street be referred to the street committee." That committee reported in favor of the measure, and recommended that an application should be made to the legislature for

leave to make the improvement. Application was accordingly made, and an act was passed by the legislature, on the 17th of April, 1854, entitled "An act to widen Fulton street, between Red Hook Lane and Court street, in the city of Brooklyn," and providing that "Fulton street, between Red Hook Lane and Court street, *is hereby widened* as follows." The second section provides that the common council *may* apply to the county court, or to the supreme court, at a special term, for the appointment of commissioners of estimate and assessment, &c. Subsequently the common council adopted a resolution directing the city counsel forthwith, upon the receipt of "the act *widening* Fulton street," to take the necessary and legal measures *to carry out the provisions of the law for that purpose.* The city counsel accordingly applied to the county court for, and procured the appointment of, three commissioners of estimate and assessment. *Held*, that the statute was peremptory upon the common council to pursue the designed improvement to its consummation; and that upon the refusal of the common council to proceed with such improvement, a *mandamus* would lie. *The People ex rel. Fisk* v. *Common Council of Brooklyn*, 404

3. *Held further*, that the provision in the 2d section of the statute, that the common council "may" cause application to be made for the appointment of commissioners, did not leave it optional with the common council whether to proceed or not, nor indicate that the project had not been conclusively adopted, and its completion peremptorily ordered, by the legislature. *ib*

4. Where the clerk of the marine court in the city of New York refuses to issue an execution when it is his duty to issue it, a performance of that duty may be compelled by a mandamus issuing out of the supreme court. WHITING, J., dissented. *The People ex rel. Debenetti* v. *Gale*, 502

MARINE COURT.

See APPEAL.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MORTGAGE.

1. On the 10th of September, 1850, B. executed a mortgage to C. to secure the payment of $4500 and interest, on four blocks of land in the village of Yonkers, bounded and described by the outer limits of the whole together, and also as lots 1, 2, 33, 34. This mortgage became due, according to its condition, by a default in the payment of interest. On the 23d of September, 1853, B. the mortgagor, and his wife, conveyed to G. B. by deed dated August 30th, but not acknowledged until September 22d, 1853, four lots, Nos. 95, 96, 97 and 98, part of the original lot No. 33 included and described in the mortgage previously given to C. By this deed these four lots were to be subject to $640 of the C. mortgage. This deed, though actually delivered about the time of its acknowledgment, was not recorded until February 27, 1854. On the 25th of January, 1854, B. and wife executed two mortgages to the plaintiffs, both dated December 2, 1853, and recorded January 27, 1854. One of these was given for $6000 upon the original lots 1 and 2, embracing 14 of the small lots, Nos. 81 to 94 inclusive. The other was for $4000, and was upon all of the original lots 33 and 34 to which B. then held title; i. e. all of those lots except the subdivision lots Nos. 95, 96, 97 and 98, which had been sold and conveyed to G. B. In March, 1854, B. and wife executed a mortgage to McK. for $2000, upon these lots Nos. 95, 96, 97 and 98, and also upon another lot. The plaintiffs took an assignment of B.'s first mortgage to C., and brought a suit for the foreclosure of all three of the mortgages executed by B. The amount due on these mortgages not being disputed, the only question was as to the order in which the various lots should be sold, or their proceeds applied to satisfy the incumbrances. *Held*, 1. That the plaintiffs became purchasers of an equitable interest in all the residue of the lands mortgaged by B. to C. including lots 95, 96, 97 and 98, and as to that interest, viz: the right to have the first mortgage charged on

those lots, that the conveyance to G. B. was void because it was not recorded. 2. That the mortgagee C. and his subsequent grantees, or persons standing in that relation—as G. B. and his mortgagee McK.—were entitled to the benefit of any probable or possible surplus after applying the proceeds of that portion of lots 95, 96, 97 and 98 included in the mortgages to the plaintiffs, to satisfy those mortgages. *The La Farge Fire Ins. Co.* v. *Bell*, 54

2. The decree therefore provided for the sale, first, of the land embraced in the mortgage from B. to C., except the lots 95, 96, 97 and 98, and for the sale of this in two separate divisions, according to the two second mortgages held by the plaintiffs. After reserving the amount of these two second mortgages, each out of the proceeds of its own parcel of these lands, the residue was directed to be applied to the satisfaction of the original C. mortgage. And if the residue of such proceeds, after deducting the amount of the second mortgages, should not be enough for that purpose, then, and before applying the amount reserved for the two second mortgages, the lots Nos. 95, 96, 97 and 68, were ordered next to be sold and the proceeds applied, and then the proceeds of the other parcels retained were to be applied ratably, to satisfy the C. mortgage. If any thing should remain, after this was paid, each parcel was to be charged with its own mortgage. And if there should be a surplus, after satisfying the three mortgages held by the plaintiffs, in the order and manner of applying the proceeds of the various parcels, as before directed, it was ordered to be brought into court for a proper distribution. *ib*

. The right which a grantee with warranty of a portion of mortgaged premises has, to have the mortgage satisfied first out of the part remaining unsold, is an equitable and not a legal right; and therefore, any rights which the holder of the first mortgage on the whole premises may have, are not affected, nor are any obligations imposed on him, unless he has notice of the subsequent partial alienation. *ib*

. The holder of the first mortgage has two funds for the payment of his debt—the portion of the mortgaged premises sold and conveyed, and the residue remaining in the mortgagor—to either of which he may resort. *ib*

5. The mortgagor having aliened a part, covenanting to protect his grantee against the mortgage, the grantee becomes a surety for the mortgage, as to the portion of the premises conveyed to him. He has a right, therefore, as against the mortgagee, to insist that he shall not deal with the lands not aliened, which are by the covenant of the mortgagor with him the primary fund for the payment of the debt, so as to increase his own liability, or diminish that fund; provided, however, the mortgagee have notice of the facts out of which these equities arise. *ib*

6. An insurance company, taking mortgages subseqent in date to an unrecorded deed of the same premises embraced in the mortgages, will not be charged with constructive notice of such deed, by the fact that the grantor and mortgagor was, at the date of the deed, and at the time of executing the mortgages, a director in the insurance company. *ib*

7. At common law, a mortgage, being under seal, imported a consideration, and proof of a failure, or want, of consideration was not admissible to impeach it. *Calkins* v. *Long*, 97

8. This rule of the common law has not been so far altered by the statute allowing a party bound by an instrument under seal to set up a want of consideration at law, (2 *R. S.* 406, § 77,) as to enable a mortgagor to apply to a court of equity to cancel the mortgage, upon the ground of a want, or a failure, of consideration. *ib*

9. The language of the statute seems to confine the change or modification of the common law to cases where an action is brought upon the instrument itself, or where the instrument is made the foundation of a set-off. *ib*

10. A trust created by a husband, for the support and maintenance of his wife who has left him in consequence of alleged ill treatment, and is living separate and apart from him, is a valid trust, and will uphold a mortgage given by the husband, to a trustee, to secure the payment of a specified sum annually for the wife's support *ib*

11. Where such a mortgage is given by a husband, after a separation has taken place for alleged ill usage of the wife by the husband, and upon a claim of the wife, that she is entitled to have provision made for her maintenance, in consequence of such ill usage, the presumption is very strong that there were grounds upon which to found such a claim. The very fact of reluctantly giving a mortgage, under such circumstances, affords a strong presumption that there was a good consideration to uphold it, founded in the ill treatment of the wife and her consequent claim for separate maintenance. *ib*

12. C. had lived on unpleasant terms with M. his wife, and she had quit him, in consequence of alleged ill treatment, and refused longer to live with him. C., in order to secure to his wife a separate maintenance, gave to L. a mortgage for $1700, conditioned to pay the latter $100 annually, so long as M. should remain the wife or widow of C.; and if default should be made in the payment of the said $100 annually, then and in that case the said sum of $1700 should be collected of the mortgagor by a sale of the mortgaged premises; and for that purpose a power of sale was contained in the mortgage. *Held*, that such mortgage was not void upon grounds of public policy as interfering injuriously with the conjugal relations, and a complaint, filed by C., the mortgagor, praying that the mortgage might be given up and canceled, or that L. should cancel the same, and be prohibited from collecting it, was dismissed. *ib*

13. In an action of ejectment, it appeared that in 1818 the title to the premises in question was in Peter Young; who was the common source of title of the respective parties. In October of that year, S. S. Munn recovered a judgment against Young and A. Cutler, which was docketed on the 24th of October; and in November following, John Mowatt, jun. recovered a judgment against the same persons, which was docketed on the 12th of that month. Executions were issued on these judgments; and under that issued upon the Munn judgment, the premises were sold to H. D. Barto the latter part of December, 1819, or early in 1820. Under the one issued upon the Mowatt judgment, the premises were sold to W. Platt about the same time. Peter Young was then in possession of the premises, and continued in possession until 1850, claiming title under a life lease from Jacob J. and John J. Young. No deed was executed to Barto, by the sheriff, until April 22, 1853. Barto conveyed to Jacob J. Young and John J. Young, by deed dated November 7, 1820, which was recorded the 17th of the same month. In the description of the premises in this deed, it was stated that they were purchased by Barto, at a sale by the sheriff, under the Munn judgment. John J. Young conveyed to Andrew J. Cutler and others, by deed bearing date May 22, 1847, proved June 27, 1849, and recorded the 8th of October thereafter. The defendant was in possession of the premises as tenant of Andrew J. Cutler. A deed was executed by the sheriff to Platt, on the sale to him, dated February 2, 1820, acknowledged the same day, and recorded the 26th of February, 1820. Platt conveyed the premises to J. S. Beebe, by deed dated February 21, 1820, and recorded April 2, 1828. Beebe conveyed to A. Cutler, by deed dated February 27, 1828, and acknowledged and recorded November 11, 1828. A. Cutler executed a mortgage of the premises to the N. Y. Life Insurance and Trust Co. dated November 29th, 1832, which was recorded on the 5th of December, 1832. This mortgage was foreclosed, and the premises were all sold under the judgment in the foreclosure suit, to the mortgagees, who took a deed from the sheriff dated the 13th and recorded the 14th of February, 1852. The Trust Co. conveyed to E. Baker, by deed dated April 12th, 1852, acknowledged the 19th and recorded on the 31st of the same month; and the plaintiff deduced title from Baker. *Held*, 1. That A. Cutler, at the time of the execution of the mortgage by him to the N. Y. Life Insurance and Trust Co., having a regular paper title to the premises, duly recorded, through the judgment of Mowatt against Peter Young, and the records not showing any deed from the sheriff on the sale to Barto, the mortgagees were, under the recording acts, entitled to a preference for the mortgage over the title under the Munn judgment; unless at the time of taking the mortgage, they had notice of that title. 2. That the record of the

deed from Barto to Jacob J. and John J. Young, containing a recital of the sale under the judgment, was not such notice. And that there being no record of a conveyance to Barto, and no evidence of notice that he made any claim to the premises, they were not required to search for a conveyance by him, and were in no way affected by the record of such conveyance. 3. That Peter Young being the acknowledged owner of the premises, in fee, and his entire title having been sold and conveyed under the Mowatt judgment, the possession by him, thereafter, being of the same character as before, without any apparent change, the fair inference, and legal presumption, from his continued possession, was that he was in under Platt, the purchaser and grantee of the sheriff, and those coming under him. 4. That the mortgage lien must be preferred to the title of the grantees in the deed from Barto. 5. That there was no such adverse possession as would avoid any of the conveyances in the plaintiff's chain of title. That Peter Young, while in possession, was estopped by the sale and conveyance under the Mowatt judgment, and by the decree in the foreclosure suit, to which he was a party, from setting up a title in himself; and that Henry and A. J. Cutler going into possession under Peter Young, they were estopped, in like manner with him, from disputing the title sought to be enforced by the plaintiff. 6. That the mortgage having priority, notice to the mortgagees, of the hostile title, at the time of the sale under the decree in the foreclosure suit, or, subsequently, to any person claiming under that sale, could not affect their title under the mortgage. That the protection which the mortgagees might claim, could not be impaired by a subsequent notice; and that it extended to all persons claiming title through the mortgage, whether they had notice at the time of the purchase or not. *Cook* v. *Travis*, 338

N

NEGLIGENCE.

See ACTION, 3, 4.
RAIL ROAD COMPANIES, 8, 9, 12, 13.

NEW TRIAL

See SLANDER, 2.

NEW YORK CITY.

1. When the charter of the city of New York, granted in 1830, declared that the legislative power of the corporation should be "vested in a Board of Aldermen and a Board of Assistants," who, together, should form the common council of the city, it must be considered as having adopted, by implication, so far as applicable, the universally recognized principles of *legislative* bodies, consisting of two independent branches. *Wetmore* v. *Story*, 414

2. Hence a resolution, adopted by the board of assistants, in one year, cannot be concurred in by the board of aldermen in another year, so as to make it, without consulting the existing board of assistants, an ordinance of the common council. It must, as in the case of unfinished business in other legislative bodies, be taken up *de novo*. *ib*

3. Accordingly *held* that the board of aldermen of the year 1853, could not take up, and pass, a resolution of the board of assistants of the year 1852, authorizing the construction of a rail road in the streets of the city, and give it effect as a law, without consulting the newly elected body. *ib*

4. Such a resolution, although passed by a board of aldermen and by a board of assistants, is not a resolution of the *common council*, and, as a consequence, was not confirmed by the act of the legislature, passed April 4, 1854, relative to the construction of rail roads in cities. *ib*

5. That act, in excepting from its operation rail roads already "constructed in part," meant those constructed under lawful authority, and not such as were made under grants, licenses, resolutions or contracts which had never been made, given, passed or entered into according to the charter, and which, therefore, having in judgment of law no existence, could not be confirmed. *ib*

6. A rail road constructed in the streets of the city of New York under and by virtue of a resolution adopted by the board of assistants, in one year, and concurred in by the board of aldermen in another year, having no warrant for its commencement, and none for its continuance, is not only a public nuisance, but a public nuisance of which tax payers and owners of property on the streets through which the rails are laid have a legal right to complain, as specially injurious to them, in their ingress and egress to and from their places of business. *ib*

NOTICE.

See MORTGAGE, 3, 5, 6, 13.

NUISANCE.

See GAS WORKS.
NEW YORK CITY, 6.

O

OFFICE.

See MANDAMUS, 1.

OFFICERS.

See POWER.

OPINIONS OF WITNESSES.

1 Witnesses acquainted with the value of personal property may testify to their opinion of its value. The rule that witnesses must state facts, and not opinions, has no application. *Rogers* v. *Ackerman*, 134

2. Where the plaintiff, upon a sale of a pair of horses to the defendant, warranted them to be sound and of the ages of 10 and 11 years only, and in an action by the plaintiff to recover the price, the defendant proved that the horses at the time of the sale, were over 20 years old; *Held*, that he might also prove, by witnesses who knew the horses, and who were acquainted with the value of that kind of property, that if the horses had been only 10 or 11 years old at the time of the sale, they would have been worth from $60 to $100 more than they actually were, being 20 years old and upwards. *ib*

3. In an action to recover damages for a fraud in an exchange of horses, it is proper to ask a witness what the defendant's horse was worth, at the time of the trade, if kind and not balky. *Nickley* v. *Thomas*, 652

4. A witness, testifying that he knows a particular stove, and is acquainted with the value of stoves, is within the rule which authorizes a witness to fix a value upon property. *Smith* v. *Hill*, 656

OVERSEERS OF THE POOR.

1. After two overseers of the poor have united in commencing an action, and in the employment of counsel to appear in their joint behalf, to prosecute it, one of them alone, without the consent or concurrence of the other, has no power to discontinue the suit. *Perry* v. *Tynen*, 137

2. The act of withdrawing such suit involves the exercise of judgment and discretion—in other words, is a judicial act—and it cannot be done without the conjoint act of both the plaintiffs, determined upon while they are conferring together. *ib*

P

PARTIES.

See INSURANCE COMPANIES.

PARTITION.

1. The section of the title of the revised statutes relative to executions, &c. which provides that the omission of the sheriff to give notice of sale under an execution shall not affect the validity of any sale made to a purchaser in good faith without notice of any such omission, applies to sales under a judgment in partition. *Lefevre* v. *Laraway*, 167

2. All the provisions of the title in relation to the notice of sales by sheriffs on execution, are made applicable to sales of lands under a judgment in partition. *ib*

3. The provision that the notice of sale of lands, in partition, shall be for the same time, and in the same manner, as is required on sales by sheriffs on execution, necessarily implies that in every case where an omission to give notice of sale, or an irregular notice, will not invalidate a sale by a sheriff on execution, a like omission to give notice of sale, or a like irregular notice, will not affect the validity of a sale of lands in partition. *ib*

4. The provisions in the title of the statute relative to the partition of lands, which declare that conveyances by commissioners, or a master in chancery, shall be a bar, both in law and equity, against all persons interested in the premises, who are parties to the proceedings, will also cure any defect or irregularity in the notice of sale. *ib*

PENALTY.

See PLANK ROADS.

PLANK ROADS.

1. The statute imposing a penalty of $25 upon every person who shall "*forcibly* or *fraudulently*" pass any gate on any turnpike or plank road without having paid the legal toll, is penal, imposing a penalty or forfeiture for the benefit and protection of a private corporation, and in derogation of common right; and is not, therefore, to be extended, by construction, to cases within the mischief intended to be remedied, but which are not within the words of the statute. *The Bridgewater and Utica Plank Road Co.* v. *Robbins*, 662

2. The terms "forcibly or fraudulently" in the statute, must be held to have been used in their ordinary sense, and to mean actual force, or actual fraud, as distinguished from constructive force or fraud. *ib*

3. Accordingly, where the defendant, finding a gate, upon a plank road, open, passed through the same with his team, and on being requested to pay toll, declined, saying that he ought not to pay toll, as the road was bad, but would do so if B. said he must; and on another occasion he again passed through the gate, on finding it open, without paying toll, although informed that B. said he must pay toll, no effort being made, by word or deed, on either occasion, to stop him; *it was held* that this did not amount to a forcible or fraudulent passing of the gate, so as to subject the defendant to the penalty. *ib*

PLANK ROAD COMPANIES.

1. A plank road company being about to construct a plank road from Fishkill to Beekman, entered into an agreement with the supervisor and commissioners of highways of the town of Fishkill, for the use of a certain highway in such town. By this agreement the supervisor and commissioners consented and agreed that the company should take and use forever the highway in question, or so much and such parts thereof as the company might require and should locate their road upon. As the consideration for this grant, the company agreed to keep said road, so occupied and taken by them, with all bridges across which their road should pass, in good and sufficient repair. In an action by the town against the company for a breach of this agreement, in not repairing a bridge, the defense was that the highway and bridge in question had never been occupied and taken by the company for the use of their road, and therefore they had never assumed their support. But it appearing that the company had taken possession and control of the highway and bridge in question, which were upon the direct route between one designated termination of the plank road and the other, and were a part of the highway which they had obtained the right to take; and that they had expended labor, laid down plank, and constructed their road upon and over them, in the same manner as they had done in respect to the residue of the road; *it was held* that these acts, in the absence of any explicit and legal declaration to the contrary, warranted the conclusion by the town

officers, that the company meant to assume and to use the bridge and that part of the road connecting with it. *The Town of Fishkill* v. *The Fishkill and Beekman Plank Road Co.* 634

2. *Held also*, that for all the purposes of the action, and of the contract, the company appropriated the highway as far as they constructed a plank track upon it, or assumed control of it. *ib*

3. *Held further*, that the town of Fishkill, in its corporate character, could not sue for a breach of the contract by the plank road company. *ib*

4. The inspection of a certain length of plank road, and the certificate of the inspectors, under § 34 of the plank road act, do not furnish conclusive, nor the best, evidence of the entire length of the road, and of the extent to which a highway has been appropriated. *ib*

5. Such inspection, and the certificate that it has been made, were not intended for any such purpose; but were designed only to ascertain the character of a road, after it has been completed, and whether it is a good and substantial road, in conformity with the law, so as to authorize the company to demand tolls for its use. *ib*

6. The compensation and damages for the use and occupation of a highway, by a plank road company, which the public officers are authorized by the statute to agree upon, need not be wholly estimated and paid in money. A part of the compensation may be in the shape of an executory agreement, by the company, to keep the roads and bridges in repair. *ib*

7. An agreement to that effect, made by the supervisor and commissioners of highways, is not void for an excess of authority by the town officers in making it, but is within the line of their duty and obligation. *ib*

PLEADING.

1. A defense cannot be made out, in pleading, by connecting two or more separate defenses together, any more than it could formerly, by connecting together two or more special pleas, each insufficient of itself. *Spencer* v. *Babcock*, 326

2. Where a complaint alleges that a judgment was recovered, and that it was a lien and incumbrance upon a lot, this will be considered as embracing the fact of the *docketing* of the judgment, and its legal effect. *Cady* v. *Allen*, 388

3. Yet, if necessary, in such a case, the complaint may be amended on the trial, by the insertion of an allegation in due form of the docketing of the judgment; and the court will permit this to be done, upon appeal, as of the time when the complaint was prepared, without terms. *ib*

POSSESSION.

1. It is a general rule that the possession of land is notice to others of the possessor's title. But the rule is not universal. The notice is merely an inference; it may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title or claim. *Cook* v. *Travis*, 338

2. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation. *ib*

3. A purchaser of goods sold on execution has such an actual or constructive possession as will entitle him to maintain an action against a trespasser. *Smith* v. *Hill*, 656

See VENDOR AND PURCHASER, 10, 11, 13, 14, 15, 16.

POOR.

1. The statutes relating to the support of the poor at county poor-houses furnish no authority for a discrimination between county and town poor, in respect to the application of the income of the poor-house farm. On the contrary the legislature intended the income should be applied to the support of the poor of the county gener

ally at the poor-house, without distinction. *City of Rochester* v. *Supervisors of Monroe*, 248

2. The statutory provisions obviously contemplate that the benefits resulting from the poor-house and farm shall be common to the county and towns, in respect to the support of the poor at the poor-house, without any regard whatever to the general obligation of each to support its own poor. *ib*

3. The occupancy of the property, the products of the farm consumed thereon and in the poor-house, the labor of the poor in carrying on the farm and the business of the poor-house, the avails of sales of products of the farm and the labor of the poor, are all to go, and be applied, to reduce the expenses of the support of the poor generally, at the poor-house, without any discrimination. *ib*

4. Thus, where the city of Rochester, was, by law, in the condition of a town, in respect to the mode of supporting its poor at the county poor-house; *it was held* that the income of the poor-house farm in Monroe county ought to be applied to the support, indiscriminately, of the county, town, and city poor, kept at the county poor-house on said farm. *ib*

POWER.

1. Where power is delegated for a mere *private* purpose, all the persons (if more than one) upon whom the authority is conferred must unite and concur in its exercise. In cases of the delegation of a *public* authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—i. e. if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend. *Perry* v. *Tynen*, 137

2. If there are only two to whom a public authority is delegated, it necessarily follows that nothing can be done without the consent of both. *ib*

PRESUMPTION.

Where a paper is shown to be in the hands of a party, and he declines to produce it, upon notice, the inferences are to be taken, in connection with the proof of its contents, most strongly against him. *Barber* v. *Lyon*, 622

PRINCIPAL AND AGENT.

See VENDOR AND PURCHASER, 1 to 9.

PROMISSORY NOTES.

In an action upon a promissory note, it is a sufficient ground for excluding evidence that the time for payment of the note had been extended, that no such defense is set up in the answer. *Newell* v. *Salmons*, 647

See ALTERATION OF INSTRUMENTS.
SET-OFF, 4, 5.
WITNESS, 3.

PUBLIC AGENTS.

1. A public agent, acting in the line of his duty, is not personally liable upon contracts made by him on behalf of the government; unless it appears that the credit was given to or the labor performed for, the agent himself, and on his agreement and promise to pay; or the fact of his being a public agent was unknown, and not disclosed at the time of making the contract. *Nichols* v. *Moody*, 611

2. A distinction exists between public agents and those of a private character, in respect to their personal liability. *ib*

3. Ordinarily, an agent contracting in behalf of the government, or of the public, is not personally bound by such contract, because it is not to be presumed, either that a public agent intends to bind himself personally, or that a party contracting with him in

his public character means to rely upon his individual responsibility. *ib*

4. A collector of the customs of the United States government is not, in the absence of an express promise to pay, liable for the wages of a person employed by him as night watch and oarsman. *ib*

5. The doctrine of *respondeat superior* applies to such a case. *ib*

R

RAIL ROADS.

1. A rail road in the streets of the city of New York, if a nuisance, may be restrained by injunction, upon the application of the parties specially aggrieved. *Wetmore* v. *Story*, 414

2. But such parties are not entitled to any compensation, nor to an injunction, on the ground that no compensation has been awarded to them for the land in the streets, claimed by them; inasmuch as, even if they have any title to those lands, their property will not be used for any purpose other than to pursue previously acquired privileges. *ib*

3. An authorized rail road in a city is not, *per se*, a nuisance. When the principal act is sanctioned, that legalizes the temporary obstruction to the public, caused by the prosecution of the appropriate work, and would prevent any effectual action by individuals on account of any consequential injury—although it might be peculiar to them—which should necessarily result from it. But it is otherwise when the rail road is constructed without the requisite authority. *Per* S. B. Strong, J. *ib*

See New York City.

RAIL ROAD COMPANIES.

1. A rail road company, by its printed rules and regulations, prohibited its engineers from allowing any one, not in its employ, to ride upon the engines. The plaintiff applied to an engineer for permission to ride upon the engine, and was informed that it was against the rules of the company to carry him in that place, but the engineer finally consented that the plaintiff might ride with him, and he did so, without the knowledge of the conductor, and paying no fare. *Held*, that the consent of the engineer conferred no legal right, and that the plaintiff not being lawfully upon the engine, was a wrongdoer, and could not recover damages of the company for an injury sustained while riding in that place. *Robertson* v. *The New York and Erie Rail Road Co.* 91

2. *Held also*, that the *onus* was on the plaintiff to show that the engineer had authority from the company to permit him to ride upon the engine; the presumption being that he had no right to be there, whether he paid fare or not. *ib*

3. A rule or custom of a rail road company, requiring passengers, soon after starting, to surrender their passage tickets to the conductor and receive his checks in place of them, is a reasonable rule or custom. *The Northern Rail Road Co.* v. *Page*, 130

4. And where a passenger, with knowledge of such custom, purchases a ticket, the law will presume that he does so in reference to the custom. *ib*

5. The contract, on the part of the rail road company, is that they will carry the passenger over their road, provided he surrenders his ticket to the conductor when it is demanded; and the passenger will not be entitled to his passage in the cars, without the surrender of his ticket. *ib*

6. His refusal to deliver up his ticket to the conductor, when it is demanded, will justify the latter in exacting from him his fare, in cash, and on his refusal to pay his fare, he may be expelled from the cars. *ib*

7. If he leaves the cars without giving up his ticket, or paying for his passage, an action will lie against him for the amount of his fare. *ib*

8. In actions brought to recover damages for an injury alleged to have been occasioned by the negligence of the defendant, whether the defendant be an individual or a corporation, to entitle the plaintiff to recover, he must show some fault on the part

of the defendant. And that fault will not be inferred merely from the injury; unless the defendant is a common carrier of persons and the plaintiff was a passenger. *Terry* v. *The New York Central Rail Road Company*, 574

9. The plaintiff in such an action cannot succeed if it appears that his own misconduct co-operated with the wrongful act of the defendant, to produce the injury complained of. *ib*

10. The plaintiff cannot succeed if it appears that the injury complained of was received by him while he was trespassing upon the defendant, without proving that such injury was willful and intentional, on the part of the defendant. *ib*

11. Where a fence, between a rail road and the adjoining farms, which it is the duty of the land owners to keep in repair, is destroyed by fire communicated by the engines in use upon the rail road, and the rail road company neglects to rebuild such fence, this will not render the company liable for the value of a horse which strays upon the track of the road from an adjoining pasture where it is kept, through the open fence, and is killed by the engine. *ib*

12. Although the rail road company may be liable to pay the owners of the fence the damages occasioned by the burning thereof, they are under no legal obligation to repair it, under such circumstances; nor have the owners a right to abandon the rest of their property, and charge the rail road company for all the damages they may sustain by reason of such neglect or abandonment, while the fence remains unrepaired. *ib*

13. And if an individual suffers his horse to run at large in a pasture adjoining a rail road, between which and the rail road there is no fence, without showing any legal reason or excuse therefor, this is such carelessness and negligence on his part, that if the horse goes upon the rail road track and is killed, without any willful negligence by the rail road company or its servants or agents, he can have no remedy against the company. *ib*

14. Where a rail road company, which cannot become entitled to the possession and use of land required for the purposes of its road, except on the payment of the damages sustained by the several proprietors, by the appropriation of their land, lays out its road through a farm, causes the damages to be assessed, and takes possession of the land required for its road, and continues in the public and undisturbed possession thereof for several years, this is *prima facie* evidence that it has paid to the land owner the amount of the assessment. *ib*

RECOUPMENT.

1. In an action for the recovery of the stipulated price for building a steam engine, boilers, &c., the defendants cannot recoup the gains and profits which would have arisen from the use of the engine, &c., had the same been delivered at the time agreed, and which gains and profits the defendants have been prevented from receiving, by the failure of the plaintiff to perform his contract within the time. *Griffin* v. *Colver*, 587

2. In such a case the defendants are entitled to recoup the loss of the value of the use of their machinery, &c., but not the profits of running it, in their ordinary business. *ib*

3. The gains and profits recoverable are those only which are the direct and immediate fruits of the contract, expressly stipulated for, or contemplated, by the parties. *ib*

REFEREE.

Where the evidence in regard to a matter set up by the defendant as a set-off is conflicting, and it appears, upon a fair construction of the report of the referee, that he has found against its existence, his decision on that question cannot be disturbed. *Cady* v. *Allen*, 388

REFERENCE.

1. The reference to a referee to take and state an account between the parties, in an action for the dissolution of a joint stock company, and for an accounting among the associates, under

the 2d subdivision of sec. 271 of the code, is the reference of the former courts of equity, such as was always made to a master in cases of accounting. And the practice of the court of chancery in respect to references of that nature, is still in force in regard to proceedings before referees. *Ketchum* v. *Clark*, 319

2. Hence, where no objections are made before a referee, as to the mode of proceeding, and no exceptions are taken to his report, both parties are concluded by the report, and neither is entitled to raise any question in respect to the details of the account, on the hearing of the cause upon the referee's report and the proofs. *ib*

REWARD.

See ACTION, 2.

S

SALE OF GOODS.

1. In an action for the non-delivery of goods agreed to be sold, if there is no evidence of their value at the place of delivery, evidence is admissible of their value at other places in the neighborhood of the place of delivery, and also at distant places where there is a market for the same articles, in connection with proof of the expense of transportation between such places and the place of delivery. *Wemple* v. *Stewart*, 154

2. It is only where the evidence is clear and explicit, as to the value of the article at the place of delivery, that evidence of value at other places is inadmissible. *ib*

SET-OFF.

1. In an action brought against the defendant to recover damages for diverting the water of a stream from the plaintiff's land, by cutting ditches on the defendant's land, above the plaintiff's lot, the defendant cannot set up as an equitable defense, the violation or non-performance by the plaintiff of an agreement between the parties, relative to the deepening of the channel of the stream through their respective lands, made four years prior to the alleged diversion of the water by the defendant; there being no connection between the agreement and the cause or subject of the action. *Pattison* v. *Richards*, 143

2. Neither can such agreement be set up as a counter-claim, or set-off, or by way of recoupment of damages. *ib*

3. In an action for a tort, previous to the code of 1852, set-offs were not allowed; nor are set-offs in actions for torts now allowed as counter-claims, under the 2d sub. of sec. 150 of the code of 1852. *ib*

4. The provisions of the revised statutes respecting set-offs, are so far modified by the code as to admit of a set-off or counter-claim, on behalf of one or more of several defendants, where a *several judgment* may be had in the action, between the plaintiff and any one or more of the defendants, as upon a joint and several promissory note. *Newell* v. *Salmons*, 647

5. Therefore, in an action upon a promissory note signed by two persons, one as principal, and the other as surety, a set-off of an indebtedness from the plaintiff to the principal may be allowed. *ib*

SLANDER.

1. In an action for slander, the time of the uttering of the slander as alleged in the complaint may be departed from, in evidence. A variance between the complaint and proof, in that respect, is wholly immaterial. *Potter* v. *Thompson*, 87

2. Where, in an action against husband and wife, for slander uttered by the wife, in charging the plaintiff with theft, the evidence did not show that the wife was influenced by a desire to do the plaintiff an injury; and she manifestly entertained no actual ill will or unkind feelings towards him, and merely expressed her own convictions; circumstances were proved which were calculated to excite suspicions of the plaintiff; and it was proved that the plaintiff himself had said, in view of the circumstances, that he did not blame her, and he ac-

knowledged her kindness in first speaking to him on the subject; *it was held* that this was a case for moderate damages; and the jury having found a verdict in favor of the plaintiff, for $600, a new trial was ordered, unless the plaintiff would stipulate to reduce the amount to $200. *ib*

3. To say of a married woman that she has the venereal disease; that she has the clap; that she has the pox, is actionable *per se*, without proof of special damage, and therefore she may unite with her husband in an action for the slander. GRAY, J. dissented. *Williams* v. *Holdredge*, 396

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 10, 11, 12.

STATUTES.

1. The word "shall" may be substituted for "may" in the interpretation of a statute, when the good sense of the entire enactment requires the change. *The People* v. *The Common Council of Brooklyn*, 404

2. This rule applies when a statute establishes an improvement, and devolves upon any person or persons, or a corporation, the performance of such acts as may be requisite to insure its completion. *ib*

See NEW YORK CITY, 4, 5.

SUMMONS.

See JUSTICES' COURTS, 5, 6, 7.

SUNDAY.

If property is exposed to imminent danger, it is not a violation of the statute prohibiting labor on the sabbath, to preserve it on Sunday, and remove it to a place of safety. *Parmalee* v. *Wilks*, 540

SURROGATE.

See GUARDIAN AND WARD, 5, 6.

T

TAXES AND TAXATION.

Where the charter of a village authorized the trustees to raise money by tax, to be assessed on the estates, real and personal, within the corporation, and collected from the several owners thereof, to pay the contingent and other expenses of the corporation, and the trustees imposed and assessed taxes against the defendant on certain premises of which the corporation had given a lease to another for 990 years, for $400 in hand paid, and for the annual rent of three pepper corns if demanded, of which premises the defendant was in possession, having acquired the interest of the lessee therein; *Held*, that the premises were rightfully taxed to the defendant as real estate of which he was the owner. *Trustees of Elmira* v. *Dunn*, 402

TENANTS IN COMMON.

1. Where personal property, severable in its nature, in common bulk, and of the same quality, is owned by several persons, as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it, without being liable to them, in an action for the conversion of the common property. *Fobes* v. *Shattuck*, 568

2. C. raised wheat upon the plaintiff's land, on shares, under an agreement by which C. was to harvest and thrash the wheat, and the plaintiff was to take his half of it at his barn, in the half bushel, and C. was to have the other half. Before the wheat was harvested, C. sold his interest in it to the defendant, S. When the wheat was fit to be harvested S. proceeded to cut it, divide it in the sheaf, in the field, to draw one half of the sheaves into his own barn and to put the other half into the plaintiff's barn. The plaintiff forbade his cutting or drawing the wheat, and claimed it all as his own. S. drew away what he claimed as his share—about one half the sheaves—and the plaintiff took what S. had left. In an action of tro-

ver against S. for the conversion of the wheat, *Held* that the plaintiff could recover no more than the value of his share of the wheat taken by S. That although it appeared that S. took only his half of the crop, yet that, to be entitled to that, he was bound to thrash and clean the plaintiff's half, and deliver it at his barn by measurement. And that if the wheat was to be considered as divided in the sheaf, then S. got more than his share, by the value of the labor necessary to thrash and clean the plaintiff's half. *ib*

3. *Held further*, that the performance of this labor by S. being prevented by the act of the plaintiff in claiming the whole of the wheat, and taking, thrashing and disposing of his own half as divided by S., and in taking possession of the field, the plaintiff might be considered as waiving the performance of any further acts by S. as a tenant in common, and as electing to rely upon his ownership of the whole of the wheat. *ib*

TOWNS.

1. The whole power and capacity of towns, as corporations, are derived from, and conferred by, statute. Their authority to contract or assume liabilities is restricted to cases where such action is necessary for the exercise of their appropriate functions as corporations; and their power to sue and be sued is limited to cases where the assertion of their corporate rights, or the enforcement of their corporate liabilities, require such proceedings. *Town of Fishkill* v. *Fishkill and Beekman Plank Road Co.* 634

2. As a corporation, a town has nothing to do with, and no interest in, the highways within its limits. The roads are not the property of the town, nor is the town responsible for their condition or their repair. *ib*

3. It has no rights nor responsibilities in respect to public highways, for which it can either sue or be sued. *ib*

TRESPASS.

See POSSESSION, 3.

TRUSTS.

See MORTGAGE, 10

U

USURY.

1. To constitute a usurious contract there must be—1, a loan, and 2, an agreement to pay illegal interest. And it is essential to the nature of a loan that the thing borrowed is at all events to be returned. Where the principal is *bona fide* put in hazard it is no loan; and it is no usury to take more than legal interest. *Pomeroy* v. *Ainsworth*, 118

2. It is also essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration for the loan. If the gain to the lender, beyond the legal rate of interest, is made dependent on the will of the borrower, as where he may discharge himself from it by the punctual payment, of the principal, the contract is not usurious. *ib*

See AGREEMENT, 7.

V

VARIANCE.

Where it was alleged in the complaint that the work and labor for which the action was brought was performed by Jones Wolcott, and the testimony showed that his real name was Edwin Jones Wolcott; *Held*, that this was an immaterial variance, and was properly disregarded by the referee. *Wolcott* v. *Meech*, 321

VENDOR AND PURCHASER.

1. A written agreement for the sale and purchase of property, purporting in the body of it, to be between the vendor of the one part and the purchasers, by their agent, of the other part, signed by the vendor, and by the agent in his own name merely, a seal being annexed to each name, is not executed in the name of the purchas-

ers, and is therefore void. *Sherman* v. *The N. Y. Central Rail Road Co.* 239

2. It is not binding on the agent, inasmuch as he does not profess or intend to contract for himself but for the purchasers, nor upon the latter, because it is not executed in their names. Consequently the vendor is not bound by it. *ib*

3. Adding a seal to the name of the agent, when he is not authorized to bind his principals by seals, will not vary the case. *ib*

4. The principals will, notwithstanding the seal, be bound by the contract, if it is properly executed. *ib*

5. But where the vendor declares upon the written agreement, and also relies upon the common counts for goods sold and delivered, he may recover upon the latter counts, if they are sustained by the proof. *ib*

6. In such a case the written contract should be received in evidence, not as a basis of recovery, but to show that it is void, and that therefore the plaintiff may resort to the common counts, notwithstanding the writing. There being a contract in writing, the plaintiff cannot recover on the general counts, without producing or accounting for it. *ib*

7. If it is produced and proved, and offered in evidence by the plaintiff, and excluded upon the defendants' objection, not that it was not proved, but that it was a contract between the plaintiff and the agent, the defendants cannot afterwards object, to a recovery on the common counts, that it was not actually in evidence. *ib*

8. It is not necessary to allege in the common counts that the person professing to execute the contract as agent for the purchasers, was their agent. It is sufficient to allege a sale and delivery to the purchasers; and proof that they acted by others who were their agents will sustain the allegation. *ib*

9. The written agreement forms no obstacle to proving that the person professing to act as agent was the agent of the purchasers, and purchased the property for them. *ib*

10. A parol agreement was made between the plaintiff and defendant, for an exchange of real estate, the possession to be exchanged immediately, and the respective deeds of conveyance were to be delivered as soon as the defendant's wife would consent to sign and acknowledge the deed of the defendant's property. The possession of the respective lots was accordingly exchanged, each party going into the occupation of the premises received from the other, and the defendant's wife subsequently executed and acknowledged the deed given by her husband to the plaintiff, which deed was tendered to the plaintiff, but not until after the commencement of an action of ejectment for the land agreed to be exchanged by the plaintiff. But, no time being specified by the parties within which the deed must be executed by the defendant's wife; and it not appearing that the plaintiff ever called for the deed, or gave notice to the defendant that the business must be completed; and the plaintiff having taken and retained possession of the premises which the defendant was to convey to him, and never having demanded possession of the premises in question; *it was held*, that the equitable rights of the defendant were not at all affected by the action, but remained precisely as they were before. And that if the defendant could have enforced a specific performance by the plaintiff, previous to the commencement of the action, by performing on his part, he was entitled to it afterwards; the contract having been partly performed, by exchanging possession of the lands, &c. sufficient to take it, in equity, out of the statute of frauds. *Beebe* v. *Dowd*, 255

11. *Held also*, that notice to the defendant that he must perform or the contract would be abandoned, and his omission to do so in a reasonable time, or something equivalent, was necessary to put an end to the contract. And that the delay which had occurred did not authorize the plaintiff to treat the contract as at an end, without such notice or some similar act; especially as the plaintiff had possession of the premises agreed to be conveyed by the defendant. *it*

12. *Held further*, that the tender of the deed having been made, by the de-

fendant, before answer, although after the suit was brought, he might plead it and have the benefit of it. But that strictly, a tender was not necessary, to entitle the defendant to a specific performance; an offer in the answer, to perform, being sufficient. *ib*

13. In an ordinary contract for the sale and purchase of land, which is silent in respect to the possession, a license to the purchaser to enter will not be implied. *Spencer* v. *Tobey*, 260

14. Where A. agreed to sell his improvements on a lot to B., for which B. agreed to pay a specified sum at the date of the contract, but it was not stated, and did not appear, in what the improvements consisted, and no explanation was given as to the meaning which the parties attached to the term; and A. further agreed, after stating that the title of the land was in dispute, to sell to A. as soon as the title should be settled, if it proved good, the right of soil; B. agreeing that if A. should procure such title, he would pay a specified sum, on receiving a deed; *Held*, that the contract was, in effect, that B. would pay A. a certain sum for his work and labor on the land, and a further sum for a good title when the dispute in regard to the title should be settled, with no express provision as to the possession. And that there was no implication that B. was to have possession of the premises, previous to a conveyance. That by omitting to insert any stipulation as to the possession, the right to the possession was left in A *ib*

15. *Held also*, that the fact of A. having given B. the possession, when he was not entitled to it under the contract, did not affect A.'s right to recover the possession; nor could that act, subsequent to the contract, aid in the construction of the contract. *ib*

16. *Held further*, that, assuming that B. was by the contract to have possession, no time being specified for its continuance, if he had made default in performing the contract, his right to possession was thereby terminated. That in the absence of any proof that the dispute as to the title continued, the undisturbed possession of the premises by B. for six years was *prima facie* proof that the title was settled, and good in A., and, in connection with evidence of the tender of a deed by A. and a refusal to pay, proved a default by B.; it not being incumbent on A. to prove a regular chain of title to the premises from the original source, or that the title had been adjudged valid by a competent tribunal. *ib*

17. Where a vendor agrees to pay all claims against the lot sold, it is not necessary, for the purchaser, to prove that a judgment which is a lien upon the premises has been enforced, or that he has been evicted. The fact of non-payment of the judgment is all that is necessary in order to show a breach; and the rule of damages, upon a breach, is the amount of the judgment, with interest. *Cady* v. *Allen*, 388

W

WAGERS.

1. The right of action to recover back money paid in pursuance of a bet or wager upon a horse race, depends wholly upon the statute, (1 *R. S.* 662, § 9;) no remedy being allowed by the common law. *Weyburn* v. *White*, 82

2. And the statute limits the right of action to the person who shall pay, deliver or deposit any money, property or thing in action. He cannot assign or transfer such right to an assignee, so as to enable the latter to sue thereon. *ib*

WAGER POLICIES.

See INSURANCE, (LIFE,) 2, 3, 4, 5, 6, 7.

WARRANTY.

1. The question whether words used by a vendor, upon a sale of horses, in respect to their ages, amount to a warranty, is a question of fact for the jury *Rogers* v. *Ackerman*, 134

2. No particular phraseology is necessary to constitute a warranty; but the

words used by the vendor should be understood by the parties as an absolute assertion, and not as the expression of an opinion. And it is for the jury to determine how the words were understood and intended by the parties. *ib*

WATER.

1. Any person interested in the use and enjoyment of the water of a running stream is entitled to receive it pure and uncontaminated; and he may maintain an action for any special injury sustained by him in consequence of the corruption of the water by any other person. *Carhart* v. *The Auburn Gas Light Co.* 297

2. Accordingly, where the plaintiffs, who were carpet manufacturers, occupied premises situated on the Owasco river, and had the right to use the waters of the river for supplying their works, and the defendants, who were engaged in manufacturing gas upon and near said stream, above the plaintiffs' works, suffered to flow from their gas works into the river certain noxious and offensive substances and materials, and certain tarry and oily substances, which became mingled with the water and adulterated the same as it flowed to the plaintiffs' works, and injured the wool and other materials used by them, *it was held*, that this was an injury for which an action would lie, by the plaintiffs. *ib*

3. And this, notwithstanding the defendants claimed exemption from damages and liability on the ground that the soil on which their gas works were situated was incompact and pervious, and was percolated by the water of the river, without their agency or fault; and that if any noxious substances had flowed from their works into the river it had been by the percolation of the water into the ground occupied by them, and the reflux of said water into the river intermixed with such offensive substances as escaped from the gas works into the ground, in the ordinary course of business, and without any neglect or design of the defendants. *ib*

WILL.

1. A testator, by his will executed previous to the revised statutes, after providing for his two eldest daughters, gave to his daughter M. a house and lot in Partition street in the city of New York, to her and to "her heirs and assigns forever," with the qualification, however, that if she died "unmarried and without leaving a child her surviving," then all her share of his estate, both real and personal, was to go to her sisters, or their children, as the case might be. *Held*, that M. took an estate in fee, defeasible by law in the event of her dying before her father, and defeasible by will in the event of her dying after him, leaving no issue. And M. having afterwards married, and joined with her husband in conveying the house and lot in Partition street to the defendant P. and died, leaving issue, E. the wife of the plaintiff; *held further*, that her estate in fee vested and became absolute in her, and as a consequence in P. her grantee; and that upon M's death the property did not go to E. CLERKE, J. dissented. *Chrystie* v. *Phyfe*, 195

2. Where both the subscribing witnesses to a will testified that they saw the testatrix sign the will, and that they became subscribing witnesses at her request; and one of them stated that a short time before the testatrix signed it, it had been put into her hands to read; that she read it, and then requested some one else to read it; and that S. then read it aloud, in the presence of the testatrix and the witnesses; that about an hour afterwards the testatrix requested to have the will brought, that she might sign it, and on its being brought she signed it, the subscribing witnesses attaching their signatures, upon her suggestion and at her request; and the other subscribing witness testified that after the reading of the will, the testatrix said "bring me the will, and I will write my name;" that after her signature had been completed, and those of the attesting witnesses had been attached, she declared she was glad it was done with and off her mind; and the will was thereupon folded up and handed to G. for safe keeping; *Held*, that this was a valid publica-

tion and execution of the will. *Nipper* v. *Groesbeck*, 670

WITNESS.

1 Where a witness has not been impeached, nor any foundation laid for his impeachment, by showing contradictory statements made by him as to a material fact, and he has not been interrogated as to what he said in a particular conversation, proof of declarations made by him on that occasion, in the absence of the party by whom he is called, cannot be received HARRIS, J. dissented. *Valton* v. *The National Loan Fund Life Assurance Society*, 9

2. The assignor of the demand on which an action is brought, is a competent witness for the plaintiff. *Spencer* v. *Babcock*, 326

3. In an action upon a joint and several promissory note, made by two persons, neither of the defendants can be examined as a witness in behalf of the other, to prove payment. *Newell* v. *Salmons*, 647

END OF VOLUME TWENTY-TWO.

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